SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED, J.S.C.** **PART** **2**
Justice

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WILLIAM GROTTANO,

Plaintiff,

- v -

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAILROAD,

Defendants.

INDEX NO. 151431/2013

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document numbers 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 58

were read on this application to/for Summary Judgment

Upon the foregoing documents, it is

ordered that the motion is **granted in part**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff William Grottano, an employee of Dragados USA/Judlau AJV, a joint venture, was allegedly injured on July 14, 2012 during the course of his employment as a laborer at the East Side Access Project, which entailed the excavation and construction of a railroad tunnel by defendants the City of New York ("the City"), Metropolitan Transportation Authority ("the MTA"), and the Long Island Railroad ("the LIRR") (hereinafter collectively "the defendants").

Plaintiff commenced this action by filing a summons and verified complaint on February 15, 2013. Ex. A.[1] In his complaint, plaintiff alleged common-law negligence and violations of Labor Law sections 200 and 241(6) and sections 23-1.7(d), 23-1.7(e), 23-2.1 and 23-1.30 of the New York State Industrial Code ("IC"). Id.

On or about March 22, 2013, the City, the MTA and the LIRR served their verified answer denying all substantive allegations of wrongdoing and asserting affirmative defenses. Ex. B.

In his verified bill of particulars, dated July 22, 2013, plaintiff alleged, inter alia, that he was injured on July 14, 2012 at 6:30 a.m. in tunnel EB4 at the East Side Access Project ("the project"). Ex. C, Bill of Particulars ("BP"), at par. 3.[2] Plaintiff asserted that he fell when he stepped into an "uncovered hole or opening containing an accumulation of muck including, but not limited to, mud, water, rocks, hydraulic fluid, liquid and other slick and slippery substances, said hole having been hidden by water which had accumulated as the result of the negligence of defendants . . ." Ex. C, BP, at par. 4. Plaintiff further asserted that the hole had been obscured by "an accumulation of water, muck, hydraulic fluid and other slick and slippery substances, including rocks and other liquid and foreign substances . . . " Id., at par. 5. He also claimed that defendants created the condition and had actual and/or constructive notice of the same. Id., at pars. 6-8. Additionally, he alleged that defendants were negligent and violated Labor Law sections 200, 240(1) and 241(6) and IC sections 23-1.7(d), 23-1.7(e), 23-2.1 and 23-1.30. Id., at pars. 20, 24, 26, 27-28.

[1] Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Michael J. Zisser, Esq. submitted in support of defendants' motion.
[2] The project was designed to connect the LIRR to Grand Central Station. Ex. F, at 16-17.

In his supplemental BP dated September 15, 2014 and his second supplemental BP dated August 5, 2015, plaintiff substantially reiterated his claims regarding how the incident occurred, the statutes allegedly violated by defendants, and notice. Ex. C.

On May 23, 2013, plaintiff appeared for a 50-h hearing in this matter, at which he testified that he was injured when he fell in a drain hole at the project on July 14, 2012. Ex. D, at pp. 3, 31. He testified that he began working as a laborer at the project full-time in 2009. Ex. E, at p. 8. He was employed and supervised by Dragados/Judlau, a joint venture. Ex. D, at pp. 8, 25. Although MTA and LIRR personnel were present at the site, they did not direct his work. Id., at p. 25.

Prior to the date of the alleged incident, plaintiff saw drilling and blasting being performed in the area where he fell. Id., at 39-40. He claimed he did not see the drain hole before he fell because it was covered with muck. Id., at p. 32. According to plaintiff, muck was "mud, water . . . [m]ud that [came] off the rock" during the project. Id., at p. 26-27. He further stated that muck was "debris" he and other workers removed from the tunnel. Id., at p. 27. At the time of the alleged accident, plaintiff was wearing muck boots provided by his employer. Id., at p. 28.

At the time of his alleged accident, plaintiff was walking out of the tunnel and "fell into" a "drain hole" which was 4" wide, 10-16" long, about 12" deep, and located in the center of the floor. Id., at pp. 31, 39. He recalled that the lighting in the area was "poor." Id., at pp. 29, 38. Although plaintiff initially stated that he did not work in the area where he fell (Id., at p. 32), he later stated that he had worked "[o]ff and on" in that area for approximately two years prior to his accident. Id., at p. 40.

Plaintiff stepped into the drain hole with his left foot. Id., at p. 31. When his foot went into the hole, his body twisted and he fell to ground. Id., at pp. 31-32, 34. He estimated that the depth of the muck in the tunnel ranged from 4-8". Id., at p. 47. He did not know the specific

source of the muck in the area where he fell. Id., at p. 28. The drain holes were usually covered with plywood. Id., at pp. 32-33.

Plaintiff appeared for an examination before trial on December 30, 2014, at which he reiterated that his employer was the Dragados/Judlau joint venture. Ex. E, at p. 34. On July 14, 2012, plaintiff was assembling a "slick line", which was to be used during the pouring of concrete. Id., at p. 31. His job duties also entailed cleaning muck and garbage from the ground. Id., at p. 33. The muck was formed by "debris left behind" by blasting earlier in the week. Id., at pp. 43-44.

That day, plaintiff accessed his work site, in a tunnel known as "EB4", through a stairway located at 48th Street. Id., at p. 38. Although there were two tubes which led to the 55th Street location where plaintiff worked, plaintiff never entered other than at the 48th Street location. Id., at p. 38. Plaintiff was injured as he was walking from 55th Street to 48th Street where he could exit the tunnel. Id., at p. 40. The alleged accident occurred after he had walked approximately 5-6 blocks from 55th Street towards the 48th Street exit. Id., at pp. 39-41. The area in which the alleged incident occurred had a concrete floor covered with muck. Ex. D, at p. 27.

As he walked towards 48th Street, his left foot went about 6-7" into a drain hole located in the middle of the floor. Id., at pp. 54-55. He did not know how deep the drain hole was. Id., at p. 54. He estimated that it was about 6" wide and 12-16" deep. Id. There was muck all along the ground as he walked towards 48th Street. Id., at p. 42. Earlier that week, walls and ceilings had been blasted and debris from that operation was left behind. Id., at p. 44. There were 200 watt bulbs strung along the wall in the area which allowed him to see a distance of approximately 200 feet in front of him. Id., at p. 53.

On September 10, 2015, Ashraf Mittias appeared for a deposition on behalf of nonparty AECOM, a construction management company hired by the MTA to excavate and to perform inspections at the project site. Ex. F, at pp. 8, 14, 31. As of the date of the alleged accident, Mittias was a Senior Inspector for AECOM. Id., at p. 23. Although Mittias has never been employed by the MTA, the City or the LIRR, he believed that his testimony was being given on behalf of all of those entities. Id., at pp. 9-10. According to Mittias, AECOM acted as the MTA's agent at the site. Id., at p. 13. The general contractor on the project was Dragados/Judlau, which was hired by the MTA. Id., at p. 30.

Mittias explained that the project was undertaken to connect the LIRR to Grand Central Terminal. Id., at pp. 16-17. He did not know the identity of the owner of the land where the alleged incident occurred. Id., at p. 17.

By July of 2012, concrete had been poured in EB4 and there were drain holes "embedded into the concrete" approximately every 50-100 feet. Id., at pp. 35-37. During construction of the tunnel, AECOM directed contractors at the site to cover the openings with plywood or a steel plate. Id., at p. 39-40. If an opening were not covered, AECOM's inspectors would tell the contractors to cover it. Id., at pp. 41-42. The covers were to keep dirt out of the openings and to prevent workers from falling. Id., at p. 59. Employees of Local 147, a union, were responsible for covering the drain holes. Id., at p. 55. Each inspector on every shift would prepare an inspection report. Id., at p. 45.

Mittias explained that muck was formed when rocks and dust from blasting mixed with water and that, during July, 2012, there were occasions on which the tunnel was covered in muck. Id., at pp. 48-51.

On or about May 3, 2016, plaintiff filed a motion seeking partial summary judgment against the defendants pursuant to Labor Law sections 240(1) and 241(6). In support of his motion, plaintiff submitted an affidavit, dated April 4, 2016, in which he stated, inter alia, as follows:

> I submit this affidavit only to provide a more detailed description of the accident than I gave while testifying. I did not mention these additional details in my [deposition] testimony because I was never asked for them.
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> * * *
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> The accident began when my left foot slipped because of the muck on the tunnel floor. That foot then tripped over what I later learned was a rock that was submerged in the muck and thus was invisible to me. It then went into the drain hole, causing me to fall to the tunnel floor and sustain [injuries]."

Ex. H.

By decision and order dated January 11, 2017, plaintiff's motion was denied, inter alia, on the ground that plaintiff failed to establish his prima facie entitlement to summary judgment on his claim pursuant to Labor Law section 240(1) and on his claim pursuant to Labor Law section 241(6) insofar as it was premised on a violation of IC section 23-1.7(d). NYSCEF Doc. No. 54. This Court also found that questions of fact existed regarding his claim pursuant to Labor Law section 241(6) insofar as it was premised on a violation of IC section 23-1.7(e). Id. On February 7, 2017, plaintiff filed a notice of appeal from the order. NYSCEF Doc. 56. As of the date of this decision, the appeal has not been perfected.

On September 23, 2016, the City, the MTA, and the LIRR filed the instant motion pursuant to CPLR 3212 seeking summary judgment dismissing the complaint. NYSCEF Doc. Nos. 34-47. In support of their motion, defendants submit, inter alia, an affidavit by Mittias in which he represents that, when he worked at the site on the day before plaintiff's accident, he performed a walk-through inspection but did not observe any muck, debris, or tripping or slipping hazards. Ex.

I, at pars. 6-9. He further states that plaintiff's work was supervised by Dragados/Judlau and not by AECOM, the City, the MTA, or the LIRR. Id., at par. 11. He maintains that neither AECOM nor the City, the MTA, nor the LIRR created or had any notice of the allegedly uncovered, muck filled drain hole prior to the alleged accident.[3]

The Defendants also submit the affidavit of Christopher D'Antonio, Deputy Director of OCIP Management for the MTA. Ex. J. D'Antonio represents that neither the City nor the LIRR played any role in the project or directed plaintiff's work. Ex. J, at pars. 6, 8-10. He further states that the MTA was the "owner of the [p]roject, including the EB4 tunnel and all improvements thereat", and that Dragados/Judlau was the general contractor at the site. Id., at par. 7.

CONTENTIONS OF THE PARTIES:

Defendants argue that the City and the LIRR must be dismissed from the action since they are not proper Labor Law defendants. Specifically, they assert that the City and the LIRR are entitled to dismissal since D'Antonio establishes that those defendants had no role in the project and that the MTA was the "owner of the [p]roject." They maintain that the City and the LIRR cannot be agents of the owner since they did not have the authority to supervise plaintiff's work.

Next, defendants assert that plaintiff's affidavit regarding how the accident occurred must be disregarded since it is simply an attempt to feign an issue of fact regarding his claim pursuant to Labor Law section 240(1). Defendants also maintain that plaintiff's claims for common-law negligence and pursuant to Labor Law section 200 must be dismissed since they did not create or have actual or constructive notice of any hazard.

[3] This Court notes that, although Mittias' affidavit is dated September 21, 2016, it was *notarized* on August 21, 2016. Ex. I. Further, although Mittias claims to annex "LIRR East Side Access Construction Inspection Reports" to his affidavit (Mittias Aff., at par. 8), such are not annexed thereto.

In addition, defendants maintain that, since plaintiff's accident allegedly occurred when his foot went partially into a hole, there was no violation of Labor Law section 240(1).

Defendants further argue that plaintiff's claim pursuant to Labor Law section 241(6) must be dismissed since IC sections 23-1.7(d) and 1.7(e) (1) and (e) (2) are inapplicable herein. They also maintain that, since plaintiff did not move for summary judgment pursuant to IC sections 23-2.1 (a) and (b), or 23-1.30, his claims arising from those sections must be deemed abandoned and that, in any event, such claims are without merit.

In opposition to the motion, plaintiff primarily argues that defendants failed to establish their entitlement to summary judgment as a matter of law dismissing his claims pursuant to Labor Law sections 240(1) and 241(6). He also maintains that the motion must be denied as premature since defendants have failed to appear for depositions.[4] Specifically, plaintiff asserts that, in several court orders from 2013-2015 (Ex. A to Pltf.'s Aff. In Opp.), defendants were directed to appear for depositions but failed to do so.[5] Plaintiff further asserts that the City and the LIRR failed to establish that they did not own the land on which the alleged incident occurred. Plaintiff also maintains that his affidavit, dated April 4, 2016, must be considered in opposition to the motion since it supplements his deposition testimony. Additionally, plaintiff urges that issues of fact exist regarding his negligence claim and his claim pursuant to Labor Law section 200.

In their reply, defendants argue that there is no need for the depositions of the City and the LIRR since D'Antonio of the MTA provided an affidavit representing that those defendants had no role in the project. Defendants concede that "being an 'owner' would constitute having a 'role' with respect to the subject Project, and neither the LIRR nor the City played the role of owner or

[4] As of the date of this order, the note of issue has not been filed.
[5] Only one of the orders, dated April 30, 2015, directed "defendants" to appear for depositions. The other orders directed an unspecified "defendant" to appear for deposition. Ex. 1 to Plaintiff's Aff. In Opp.

any other role on the project." Def.'s Reply Aff., at par. 6. Defendants further assert that plaintiff's affidavit dated April 4, 2016 must be disregarded by this Court because it contradicts his prior testimony and is designed to feign an issue of fact regarding the violation of IC sections 23-1.7(d) and 23-1.7 (e). They also insist that the claim of common law negligence and the claim pursuant to Labor Law section 200 must be dismissed since Mittias' affidavit establishes that they had no notice of the uncovered drain hole. Defendants reiterate their initial argument that plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6) must be dismissed.

LEGAL CONCLUSIONS:

Summary Judgment Standard

"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." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The motion must be denied if there is any question regarding the existence of a triable issue of fact. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Labor Law Section 200

"Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work." *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 143 (1st Dept 2012). Where, as here, a plaintiff alleges that a dangerous condition caused his or her accident, an owner or contractor may be held liable

under Labor Law section 200 if it created or had actual and/or constructive notice of the condition which allegedly caused plaintiff's injury. *See Cappabianca,* 99 AD3d, at 144, *citing Mendoza v Highpoint Assoc., IX, LLC,* 83 AD3d 1, 9 (2011); *see also Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 626 (1st Dept 2015).

As noted above, plaintiff alleges that he was injured when he stepped into an "uncovered hole or opening containing an accumulation of muck including, but not limited to, mud, water, rocks, hydraulic fluid, liquid and other slick and slippery substances, said hole having been hidden by water which had accumulated as the result of the negligence of defendants . . ." Ex. C, BP, at par. 4. He further asserts that the hole was hidden by "an accumulation of water, muck, hydraulic fluid and other slick and slippery substances, including rocks and other liquid and foreign substances . . ." Id., at par. 5.

Any notice Mittias would have had of the alleged conditions would have been imputed to the MTA, which retained AECOM. Such knowledge would not have been imputed to the City or the LIRR, since AECOM did not act as an agent for those defendants. Thus, Mittias' cannot establish through his affidavit that the City and the LIRR did not have notice of the alleged condition of the drain hole. Further, given that Mittias was last at the site on July 13, 2012 at 4 p.m., he cannot establish the condition of the site between that time and the time of the alleged accident the following morning. Since defendants have failed to establish that they did not create or have notice of the condition which caused the alleged accident, the branch of their motion seeking to dismiss plaintiff's claims of common-law negligence and pursuant to Labor Law section 200 must be denied. Further, the motion must be denied given that the City and the LIRR failed to establish as a matter of law that they were not owners of the site where the alleged incident occurred.

Labor Law Section 240(1)

"Labor Law section 240(1) is inapplicable to this case, because plaintiff's injuries were not 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009)." *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 (1st Dept 2014) (240[1] claim dismissed where plaintiff who, along with two co-workers, was carrying a pipe on his shoulder, slipped on a muddy surface and tripped on what he believed was a rock and the pipe struck him); *see Cappabianca*, 99 AD3d, at 146 (the alleged accident did not give rise to liability under Labor Law section 240[1] because plaintiff "was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment").

The facts of *Romeo v Property Owner (USA) LLC,* 61 AD3d 491 (1st Dept 2009) are similar to those herein. In that case, plaintiff was injured while walking on a raised computer floor. He stepped on a floor tile that dislodged, causing his right foot to fall through the 2 foot by 2 foot opening created by the missing tile and strike the concrete floor 18 inches below the raised floor. The Appellate Division, First Department held that plaintiff's injury "did not involve an elevation-related hazard of the type contemplated by the statute, and did not necessitate the provision of the type of safety devices set forth in the statute (*citations omitted*)." Id., at 491.

Here, as plaintiff walked towards the 48th Street exit from the site, his left foot went about 6-7" into a drain hole located in the middle of the cement floor. Ex. E, at pp. 54-55. At his 50-h hearing, plaintiff testified that the drain hole was 12 inches deep. Ex. D, at p. 31. At his deposition, he said he did not know the depth but estimated that it was 12-16". Ex. E, at p. 54. Thus, the hole did not require the type of devices envisioned by Labor Law section 240(1).

In opposition to the motion, plaintiff relies, inter alia, on the case of *Brown v 44 St. Dev., LLC*, 137 AD3d 703 (1st Dept 2016). However, *Brown* is clearly distinguishable since the plaintiff in that matter "fell *through* an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below" (emphasis added). Id. Thus, unlike here, the fall by the plaintiff in *Brown* was "the result of exposure to an elevation related hazard (citation omitted)." Id.

1. Labor Law Section 241(6)

Defendants also move for dismissal of plaintiff's claim pursuant to Labor Law section 241(6). That section provides, in relevant part, that:

> 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
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> * * *
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> (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.

Labor Law section 241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993). To establish a violation of this statute, and successfully oppose a defendant's motion for summary judgment, it must be shown that defendant violated a specific, applicable, implementing regulation of the IC. Id., at 503-505. Here, plaintiff has alleged violations of the following sections of the IC as a predicate to liability pursuant to

Labor Law section 241(6): 23-1.7(d), 23-1.7(e), 23-1.30 and 23-2.1. The alleged violations of these sections are addressed below.[6]

Industrial Code Section 23-1.7(d)

Section 23-1.7(d) of the IC provides that:

> Employers 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.

Although this section has been found to be specific enough to support a section 241 (6) claim (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]), if a substance is an integral part of a construction site, then it does not constitute a foreign substance under IC section 23-1.7 (d). *See Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 (2d Dept 2008) (holding that summary judgment was properly granted and that IC section 23-1.7 (d) was not violated because the plastic on which plaintiff slipped was an integral part of the asbestos removal project).

Plaintiff testified that, at the site, muck emanated from rock, that muck was debris which he took out of the tunnel, that there was muck on top of the concrete floor, and that "muck boots"

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[6] This Court notes that, in analyzing plaintiff's claims of IC violations, it has considered his affidavit dated April 4, 2016, in which he stated that the accident occurred when his "left foot slipped because of the muck on the tunnel floor" and "[t]hat foot then tripped over what [he] later learned was a rock that was submerged in the muck and thus was invisible to [him]." His foot "then went into the drain hole, causing [him] to fall . . ." Ex. H. Although defendants assert that the submission of this affidavit long after his deposition was held is improper, they overlook two critical facts. First, defendants annex the affidavit *to their own motion for summary judgment* despite the fact that it had been submitted in support of plaintiff's motion for summary judgment. Further, and contrary to defendants' vehement argument, plaintiff's affidavit was not submitted to feign a factual issue to bolster his claim pursuant to Labor Law section 241(6). This Court has reviewed the transcripts of plaintiff's 50-h hearing and deposition and concludes that, although plaintiff testified that he stepped into an uncovered drain hole, he was not asked by defendants' attorney at those proceedings whether he also slipped or tripped. Thus, his affidavit properly supplemented his testimony and was not "tailored to avoid the consequences" of his testimony. *Jahn v SH Entertainment, LLC*, 117 AD3d 473, 474 (1st Dept 2014).

were provided to him for his work. Ex. D, at pp. 26-28, 32; Ex. E, at pp. 33, 42-44. Mittias also explained that muck was formed when rocks and dust from blasting mixed with water. Ex. F, at pp. 48-49. Since this testimony demonstrates that the muck on which plaintiff allegedly slipped was an integral part of his work, the branch of defendants' motion seeking partial summary judgment pursuant to Labor Law §241(6) arising from the alleged violation of IC section 23-1.7 (d) is granted. Plaintiff's claim of any violation of Labor Law section 241(6) predicated on a violation of IC section 23-1.7(d) must also be dismissed since that section of the IC only protects individuals injured on an "elevated working surface." *Borner v Fordham Univ.*, 124 AD3d 553 (1st Dept 2015).

Industrial Code Section 23-1.7 (e)

Section 23-1.7 (e) (1) of the IC provides:

> Passageways. 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.

IC section 23-1.7 (e) (2) provides:

> 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.

Section 23-1.7 (e) of the IC has been held to be specific enough to support a claim made pursuant to Labor Law § 241 (6). *See Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004). Plaintiff testified that, at the time of the incident, he was traversing an area used to exit the tunnel, which was previously utilized as a work area in which blasting had been performed, and

that it was part of his job to clean muck at the site. Since the muck which caused plaintiff's fall "was an integral part of the work he was performing" (citations omitted), defendants cannot be liable based on section 23-1.7(e)(2). *Appelbaum v 100 Church L.L.C.*, 6 AD3d 310 (1st Dept 2004).[7]

However, the fact that the muck was an integral part of plaintiff's work does not preclude his recovery pursuant to section 23-1.7(e)(1). *See Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 (1st Dept 2015). As noted previously, plaintiff claims that his accident occurred when he stepped into an uncovered drain hole which was hidden by muck. Since defendants have failed to establish as a matter of law that they provided plaintiff with adequate protection against a tripping hazard present in the passageway he traversed,[8] that branch of their motion seeking to dismiss plaintiff's claim of a violation of IC section 23-1.7 (e)(1) is denied.

Industrial Code Section 23-1.30

IC section 23-1.30 provides that:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall 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.

Defendants argument that plaintiff's claim based on IC section 23-1.30 must be dismissed is without merit. Initially, section 27-1.30 is sufficiently specific to support a claim pursuant to

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[7] Although this Court's order dated January 11, 2017 stated that "questions of fact exist regarding how the accident occurred" which warranted a denial of plaintiff's motion for summary judgment pursuant to Labor Law section 241(6) insofar as predicated on IC section 23-1.7(e), it is evident that such denial was specifically based on plaintiff's reliance on IC section 23-1.7(e)(1), since that is the section of the IC cited in the order.

[8] Although plaintiff testified that he was injured while walking to the tunnel exit, thus suggesting that he was in a "passageway" (see IC section 23-1.7[e][1]), he also said that work had recently been performed in that area, thus suggesting that he was injured in a "working area." See IC section 23-1.7(e) (2). Thus, there is, at the very least, an issue of fact regarding whether the area was a "passageway."

Labor Law section 241(6). *See Murphy v Columbia Univ.*, 4 AD3d, at 202. Although plaintiff testified at his 50-h hearing that that the lighting was "poor" in the area where the alleged incident occurred (Ex. D, at 29, 38), he testified at his deposition that there were 200 watt bulbs strung along the wall in the area which allowed him to see a distance of approximately 200 feet in front of him. Ex. E, at p. 53. Additionally, defendants have failed to establish as a matter of law, by submission of an expert affidavit or other proof, that the lighting in the area met the requirements of IC section 23-1.30. Thus, there is, at the very least, a question of fact regarding the lighting in the area and thus defendants' motion to dismiss the claim predicated on section 23-1.30 is denied.

Industrial Code Section 23-2.1

IC section 23-2.1 (a)(1) requires "all building materials to be stored in a safe and orderly manner" so as not to obstruct any "passageway, walkway, stairway or other thoroughfare." Section 23-2.1(a)(2) addresses storage of materials so as not to "exceed the safe carrying capacity of such floor, platform or scaffold" and so as not to endanger any individual located beneath the edge of such floor, platform or scaffold. Section 23-2.1(b) requires that debris be "handled and disposed of by methods that will not endanger any person employed in the area of such disposal."

The claim premised on IC section 23-2.1(a) is dismissed. Section 23-2.1(a) is inapplicable to the facts of this case, since plaintiff did not allege that he was injured as a result of the improper storage of material or equipment. *See Ginter v Flushing Terrace, LLC*, 121 AD3d 840 (2d Dept 2014). Nor is section 23-2.1(b) applicable to the facts of this case. Further, as defendants assert, section 23-2.1(b) is insufficiently specific to support a claim under section 241(6). *See Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 (1st Dept 2007). Thus, the claim predicated on 23-2.1(b) is dismissed.

Although defendants argue that plaintiff abandoned his claims pursuant to sections 23-1.30 and 23-2.1 because he did not move for summary judgment based on them, they fail to support this argument with any valid legal authority.

Additionally, by failing to submit evidence that they did not own the land on which the alleged accident occurred, the City and the LIRR failed to establish as a matter of law that they are not proper Labor Law defendants pursuant to Labor Law section 241(6). *Cf. Oseguera v Lincoln Props. LLC*, 147 AD3d 704 (1st Dept 2017). Although D'Antonio states in his affidavit that neither the City nor the LIRR played any role in the project or directed plaintiff's work (Ex. J, at pars. 6, 8-10) and that the MTA was the "owner of the [p]roject, including the EB4 tunnel and all improvements thereat" (Id., at par. 7), this does not resolve all factual issues regarding ownership of the site. This is because section 241(6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition, regardless of whether such owner or contractor supervised, controlled or directed the work. *See Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 298 (1978).[9]

In light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants the City of New York, the Metropolitan Transportation Authority, and the Long Island Railroad is granted, in part, to the extent that plaintiff's Labor Law section 240(1) claim and any claims for a violation of Labor Law

[9] Although defendants assert that the MTA is an "owner" for statutory purposes by virtue of its contract with Dragados/Judlau, they cite no authority for the proposition that a fee owner could not also be held liable under Labor Law section 241(6). Indeed, as noted above, defendants even concede that "[s]urely, being an 'owner' would constitute having a 'role' with respect to the subject [p]roject." Defs.' Reply Aff., at par. 6. Defendants' contention that the City and the LIRR cannot have a nondelegable duty under the Labor Law because they are not statutory agents with authority to supervise and control the work is thus specious since it completely ignores the issue of whether they are owners of the site.

section 241(6) based on a violation of Industrial Code sections 23-1.7(d), 23-1.7(e)(2), 23-2.1(a), and 23-2.1(b) are dismissed; and it is further

ORDERED that the motion is otherwise denied, and that the action shall continue as to plaintiff's claims of common-law negligence, violation of Labor Law section 200, and violation of Labor Law section 241(6) based on violations of Industrial Code sections 23-1.7(e) (1) and 23-1.30; and it is further

ORDERED that defendants are to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry of this order; and it is further

ORDERED that the parties are directed to appear at a compliance conference on August 1, 2017 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

6/15/2017
DATE

HON. KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE