| **Witoff v Fordham Univ.** |
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| 2018 NY Slip Op 32994(U) |
| November 20, 2018 |
| Supreme Court, New York County |
| Docket Number: 155834/14 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ALAN WITOFF,

Plaintiff,

-against-

FORDHAM UNIVERSITY and GOTHAM CONSTRUCTION COMPANY, LLC.,

Defendants.

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Index No. 155834/14
Motion Seq. No. 003

DECISION AND ORDER

**CAROL R. EDMEAD, J.S.C.:**

In a Labor Law action, defendants Fordham University (Fordham) and Gotham Construction Company, LLC. (Gotham) (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. Plaintiff Alan Witoff (Plaintiff, or Witoff) opposes the motion. Although Plaintiff does not formally cross-move, it applies to the court for sanctions against defendants for what he characterizes as a frivolous motion.

**BACKGROUND**

This action arises out of workplace accident that took place during the construction of Fordham's new law school facilities at its Lincoln Center campus in Manhattan. On the day of the accident, March 4, 2014, Plaintiff, was working as an electrician for nonparty Five Star Electric. Fordham owns the subject property while Gotham was the general contractor on the project.

On March 4, 2014, Plaintiff testified that his accident took place on the third floor of the subject building (Plaintiff's tr at 19, NYSCEF doc No. 49). Plaintiff testified that he was carrying small electrical connectors when he "fell into a hole that was covered with carpeting" (*id.* at 22). The hole, Plaintiff testified, was "kind of deep, it was obviously covered by carpet, so I really

can't describe the hole. All I know is that when my foot went in, there was an indenture, so I know it was obviously a hole" (*id.* at 23). Although plaintiff did not cut and remove the carpet to inspect the hole after his accident, and he declined to guess its full dimensions at his deposition, he did note that the hole was big enough for his "entire foot" to fit in it (*id.*).

Plaintiff described the area where he fell as a "pathway" within a big classroom and stated that the pathway was formed by "boxes of material" on either side and that "the pathway that was there was basically the only path we were able to use" (24). Plaintiff alleges that he sustained injuries from his fall. The Complaint, filed on June 13, 2014, alleges that Fordham and Gotham are liable for Plaintiff's injuries, under Labor Law § 241 (6), as well as Labor Law § 200 and common-law negligence.

In this motion, Defendants argue globally that the Complaint must be dismissed, as any determination as to how the accident occurred would be based upon improper speculation. As to Labor § 241 (6), specifically, Defendants argue that none of the Industrial Code violations alleged are both sufficiently specific and applicable to Plaintiff's accident. As to Labor Law § 200 and common-law negligence, Defendants argue that they did not supervise Plaintiff's work and that they did not create the subject defect or have notice of it.

**DISCUSSION**

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI*

*Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

**Causation**

Initially, the court must address Defendants' global argument that the Complaint must be dismissed because any determination as to how the accident occurred would be based upon improper speculation. Defendants cite, among others, to *Vojvodic v City of New York* (148 AD3d 1086 [2d Dept 2017]), which stands for the proposition that proximate causation cannot be established where a plaintiff "is unable to identify the cause of his fall and any determination by the trier of fact as to causation would be based upon sheer speculation" (*id.* at 1088).

The court notes that "[o]rdinarily, issues of proximate cause are fact questions to be decided by a jury" (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008] [internal citation omitted]), although the issue "may be decided as a matter of law" in circumstances "where only one conclusion may be drawn from the established facts" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). This case falls on the ordinary side of that divide. Here, the trier of fact could reasonably conclude, without relying on sheer speculation, that Plaintiff tripped on a hole beneath the carpet.

Not only did Plaintiff testify that he tripped in a hole beneath the carpet, that scenario of causation is reflected in the subject accident report, which states that Plaintiff "stepped into hole in floor that was covered by carpet" (NYSCEF doc No. 61). Moreover, Anthony Vitaliano (Vitaliano), Plaintiff's co-worker and an eyewitness to the accident, provided an affidavit stating:

> "[Plaintiff] and I were walking together through a narrow, carpeted passageway used by workers on the job site. As [Plaintiff] took a step he suddenly tripped and fell. After helping [Plaintiff], I looked to see what made him trip. The carpet where [Plaintiff] stepped causing his fall was sunk below the floor level. The carpet had been installed over an open hole in the concrete floor, so that it had no support underneath it. The carpet was pushed in deep enough to trap [Plaintiff's] entire foot. The hole was completely covered and hidden by the carpet. There was no way for anyone to tell that there was an open hole under the carpet. This is

what caused Alan to fall"

(NYSCEF doc No. 58, ¶¶ 3-4).

On this record, the factfinder would not be obliged to rely on sheer speculation, as there is an ample basis in the evidence presented to determine how the accident occurred. The fact that Plaintiff did not cut and pull up the carpet to ascertain the exact dimension of the hole is not dispositive, as a plaintiff may use circumstantial evidence to establish causation where the cause of the accident may be reasonably inferred (*Affenito v PJC 90th St.*, 5 AD3d 243, 245 [1st Dept 2004]). The factfinder may, based on the evidence, reasonably infer that Plaintiff's accident was caused by a hole beneath the rug he was walking on at the time of his accident. Accordingly, the branch of Defendants' motion that seeks dismissal of the Complaint on the basis that Plaintiff cannot establish the cause of his accident without resort to sheer speculation is denied.

**Labor Law § 241 (6)**

Labor Law § 241 (6) provides, in relevant part:

> "All 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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

In its opposition, Plaintiff only alleges violation of one Industrial Code regulation, 12 NYCRR 23-1.7 (e) (1). Thus, Plaintiff abandons reliance on all other Industrial Code (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [holding that "it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]). Accordingly, the branch of Defendants' motion seeking dismissal of Plaintiff's allegations under 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (d), 12 NYCRR 12-1.7 (e) (2), and 12 NYCRR 23-2.1 is granted.

12 NYCRR 23-1.7 (e) (1) provides, in relevant part, that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Courts have held that this regulation is sufficiently specific to sustain a Labor Law § 241 (6) claim (*see e.g. Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]).

Defendants argue that 12 NYCRR 23-1.7 (e) (1) is not applicable, as Plaintiff did not trip on dirt, debris, or a sharp projection. However, the regulation encompasses "conditions which could cause tripping." A hole, being such a condition, may fall within this catchall (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [reversing dismissal of a section 241 (6) claims premised on a violation of 12 NYCRR 23-1.7 (e) (1) where the plaintiff

tripped on an uncovered "drain hole"]).

Defendants also argue that this regulation is not applicable, as Plaintiff did not fall in a passageway. However, Plaintiff and Vitaliano testify that Plaintiff tripped while traversing a passageway formed by work materials raises an issue of fact as to whether Plaintiff tripped in a passageway (*see McCullough*, 132 AD3d at 492 [interpreting the term "passageway" within the regulation broadly]). Thus, as there are questions of fact as to whether 12 NYCRR 23-1.7 (e) (1) is applicable, the branch of Defendants' motion seeking dismissal of Plaintiff's Labor Law § 241 (6) claim must be denied.

**Labor Law § 200 and Common-law Negligence**

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

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Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is

shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, the Plaintiff alleges that his injury arose from a defect on the worksite. Thus, Defendants argument that they had no supervisory control over Plaintiff is of no moment. Moreover, Defendants' one conclusory sentence stating that there is no evidence that they had notice of the defect is insufficient to make a prima *facie showing* of entitlement to judgment.

To show a lack of constructive notice, defendants must show when they last inspected for defects (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]; *compare Ezzard v One East*

*River Place Realty Co., LLC*, 129 AD3d [1st Dept 2015] [in a misleveled elevator case, defendants made *prima facie* showing as to constructive notice by providing evidence of when they had last inspected the elevator]). Here, as Defendants submit no evidence as to whether classrooms were inspected for defects either before or after the rugs were laid down, Defendants' fail to make a *prima facie* showing as to constructive notice. Thus, the branch of Defenants' motion seeking dismissal of Plaintiff's Labor Law § 200 and common-law negligence must be denied.

**Sanctions**

As Plaintiff has not formally moved for sanctions, the court does not entertain its application for such. Even if did, Plaintiff would not be entitled to sanctions, as Defendants' motion was not frivolous.

**CONCLUSION**

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted only to the extent that Plaintiff's allegations relating to Industrial Code violations, except for those allegations relating to 12 NYCRR 23-1.7 (e) (1), are dismissed; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that counsel for Defendants shall serve of a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: November 20, 2018

ENTER:

HON. CAROL R. EDMEAD
J.S.C.