

Egan v West Sq. Corp.
2018 NY Slip Op 33376(U)
December 3, 2018
Supreme Court, Kings County
Docket Number: 502827/15
Judge: Carl J. Landicino
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At an IAS Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of December, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

-----X

PETER EGAN,

Plaintiff,

- against -

WEST SQUARE CORPORATION, BOARD OF DIRECTORS OF THE WEST SQUARE CORPORATION, ROGER ZISSU, ERIC D. LAUFER, BUETI BROTHERS INC. AND PLANT CONSTRUCTION, LLC.,

Defendants.

-----X

BUETI BROTHERS INC.,

Third-Party Plaintiff,

-against-

PLANT CONSTRUCTION, LLC,

Third-Party Defendant.

-----X

The following papers numbered 1 to 16 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Index No. 502827/15

DECISION AND ORDER

MOTION SEQUENCE #5, #6, #7

2018 DEC 24 AM 11:11
KINGS COUNTY CLERK
FILED

Papers Numbered

1-3, 4-5, 6-8
9-10, 11, 12-13
14, 15, 16

Upon the foregoing papers, defendants West Square Corporation, Board of Directors of the West Square Corporation (collectively, WSC) and Eric D. Laufer move (motion sequence #5), pursuant to CPLR 3212, for summary judgment dismissing plaintiff Peter Egan's (plaintiff) complaint and all cross claims asserted against them. Defendant Plant Construction, LLC (Plant) moves (motion sequence #7) for summary judgment dismissing plaintiff's complaint, as well as defendant/third-party plaintiff Bueti Brothers, Inc.'s (Bueti) third-party complaint and all cross claims asserted against it. Bueti moves (motion sequence #6) for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it.

Background Facts and Procedural History

On April 16, 2014, plaintiff sustained various injuries in a trip and fall accident that occurred during the course of a construction project in a cooperative apartment building located at 32 Washington Square West in Manhattan (the building). The underlying construction project involved gut renovation and remodeling work whereby two existing apartment units in the building - specifically apartments 5E and 5W - were to be converted into a single, larger unit. It is undisputed that the building as well as the subject apartments were owned by WSC and that Laufer was a WSC shareholder who resided in the apartment units.¹

¹Although Mr. Laufer testified that he "owned" the apartment units, as a shareholder in the cooperative corporation that owned the building, he was technically a proprietary lessee of the units.

Several years before the accident, in or about April of 2010, Bueti was hired by Mr. Laufer to serve as the general contractor on the renovation project. Thereafter, in or about the early part of 2012, WSC approved the renovation plans and the actual renovation work began in June of 2012. In order to perform the work, Bueti subcontracted plaintiff's employer, Tribeca Restoration (Tribeca), to supply workers for the job and to assist in certain electrical work.² In this regard, Bueti's secretary, Frank Bueti, testified at his deposition that on this particular job, rather than have its own employees perform the work, Bueti contracted Tribeca to supply the needed manpower.

In a letter dated February 11, 2014, Plant agreed to perform consulting work on the project which included assessing the project over a two-week period and making recommendations regarding scheduling, staffing, and creating a list of critical items requiring monitoring. In or about March of 2014, approximately one month before the accident, Tribeca workers laid down 1/8 inch thick sheets of Masonite over a newly installed hardwood floor in the apartment units, in order to protect the floor from being marred during the ongoing construction work. The Masonite sheets themselves were butted up against the apartment walls and the seams between sheets were taped over with duct tape.

On the morning of the accident, plaintiff arrived at the apartments pursuant to his employment with Tribeca. In this regard, plaintiff had been performing electrical work on

²All of the deposition witnesses referred to plaintiff's employer and Bueti's subcontractor as Tribeca Restoration. However, in an affidavit submitted in support of WSC's summary judgment motion, Liam O'Connor states that an entity named 321 99th Street LLC was plaintiff's employer and Bueti's subcontractor. In any event, it appears that whatever its actual name, Tribeca and 321 99th Street LLC are the same entity.

the renovation project since 2012 and in the months leading up to the accident, plaintiff had been running wires throughout the apartments five days a week. Shortly before the accident, plaintiff was instructed by his supervisor, Liam O'Connor, to move tools and equipment, which he had been storing in a closet in the master bedroom, to a different part of the job site. After making approximately 5 to 10 trips back and forth moving this equipment, plaintiff tripped and fell while walking through an interior doorway between the living room and a hallway and sustained various injuries. Immediately after the accident, plaintiff noticed that a two to three-foot long section along the edge of the Masonite sheet in the doorway was raised approximately one half to one inch higher than the abutting sheet. Plaintiff testified that the duct tape along the seam between these two sheets remained intact and that he did not notice the raised edge of the Masonite sheet during the 5 to 10 trips that he had made to and from the closet immediately prior to the accident.

By summons and complaint dated March 11, 2015, plaintiff commenced the instant action against WSC, Mr. Laufer, and Bueti alleging that his injuries were caused by their negligence as well as their violations of Labor Law §§ 200, 240 (1), and 241 (6). The complaint also alleged violations of various New York State Industrial Code regulations including 12 NYCRR 23-1.5, 1.7, 1.16, and 1.21.³ Thereafter, the defendants joined issue and served answers, containing various cross claims, to the complaint. In addition, Bueti commenced a third-party action against Plant seeking common-law contribution and

³The complaint also named one Roger Zissu as a party defendant. However, the parties subsequently entered into a stipulation discontinuing all claims against Mr. Zissu.

indemnification. On July 23, 2015, plaintiff served a bill of particulars in which he no longer alleged a violation of Labor Law § 240 (1). In this regard, it is clear that the underlying trip and fall accident is not sufficiently related to the force of gravity, in order to fall under the protection of the statute. Discovery is now complete and the instant motions are before the court.

Plaintiff's Labor Law § 241 (6) Claim against Laufer

Laufer moves for summary judgment dismissing plaintiff's claims against him. In so moving, Laufer maintains that plaintiff's Labor Law § 241 (6) cause of action against him must be dismissed inasmuch he is exempt from liability under the statute as the owner of a one and two-family dwelling who contracted for, but did not direct or control the underlying work that led to the accident. In support of this argument, Laufer initially notes that, under relevant case law, the one and two-family homeowner exemption applies to shareholders who hold a proprietary lease for an apartment in a cooperative building. Laufer further contends that it is clear from his own deposition testimony, as well as the deposition testimony of Frank Buetti and plaintiff himself, that Laufer did not direct or control plaintiff's work or the manner in which the Masonite was installed.

It is well settled that owners of one and two-family dwellings who contract for but do not direct or control the underlying construction work that causes a worker's injuries are exempt from liability under Labor Law § 241 (6) (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). It is equally well settled that this exemption applies to proprietary lessees of one and two-

family cooperative apartment units such as Laufer (*Maciejewski v 975 Park Ave. Corp.*, 37 AD3d 773, 774 [2007]). Here, Laufer has made a prima facie showing that he did not direct or control plaintiff's work or otherwise oversee the installation of the Masonite on the floor by pointing to his own sworn deposition testimony, as well as the testimony of Frank Bueti and plaintiff. In opposition, plaintiff has failed to raise a triable issue of fact regarding Laufer's lack of control over the work. Indeed, plaintiff's opposition papers do not even address Laufer's argument that he is exempt from liability under the statute. Accordingly, that branch of Laufer's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against him is granted.

Plaintiff's Labor Law § 241 (6) Claim against Bueti, Plant, and WSC

Bueti, Plant, and WSC separately move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them. In so moving, Plant contends that it was not acting as the general contractor at the time of the accident and, therefore, is not subject to liability under Labor Law § 241 (6). In this regard, Plant maintains that it was originally hired in February 2014 to perform consulting work on the project, which included assessing the project over a two-week period and making recommendations regarding scheduling and staffing. Plant further maintains that it did not agree to take over for Bueti as the general contractor on the project until September 2014, several months after the accident. In support of this argument, Plant points to the deposition testimony of its project manager, Marina Faelli, who testified that Plant was originally brought onto the project in February 2014 to

assist with scheduling and that Plant did not become the general contractor until October 2014, which was after the accident occurred. Plant further points to the deposition testimony of Laufer, who testified that Bueti was the general contractor at the time of the accident, and that Plant did not replace Bueti as the general contractor until October 2014. In addition, Plant notes that plaintiff himself testified that Bueti was in charge of the project when the accident occurred. Plant also submits a copy of a building permit dated April 9, 2014 which lists Bueti as the general contractor on the project. Plant also submits a copy of its February 11, 2014 contract with Laufer in which it merely agreed to perform scheduling work and compile a list of issues facing the project. Finally, Plant submits a copy of its September 19, 2014 letter to Laufer in which it agreed to be listed as the general contractor on building permits and to “to be the contractor in a larger way for you” for a fee of \$23,750.

In further support of its motion, Plant argues that even if it is subject to liability under the statute, plaintiff’s Labor Law § 241 (6) claim must be dismissed since all of the Industrial Code regulations upon which plaintiff relies are either too general to support such a claim, or inapplicable given the circumstances of the accident.

In support of their respective motions for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim, Bueti and WSC, similar to Plant, argue that the Industrial Code regulations which plaintiff relies upon are insufficient to support a claim under the statute. However, Bueti also contends that there is an issue of fact as to whether Plant was the general contractor at the time of the accident. In this regard, Bueti points to Frank Bueti’s

deposition testimony, wherein he stated that work on the project was temporarily stopped in February 2014, that Bueti was fired as the general contractor, and that Plant took over control of the work. Bueti further submits an affidavit by its president, Serafino Bueti, in which he states that, in February 2014, Bueti was fired as the general contractor on the project by Laufer as the result of WSC's dissatisfaction with the progress of the work. Serafino Bueti further avers that, when work began again on the project in or about March of 2014, Bueti continued to perform work, but it did so under the control and supervision of Plant, which had displaced Bueti as the general contractor on the project. Finally, Serafino Bueti states that "[w]hen it came time for the job permit to be renewed in early April 2014, as a favor to Giovanna⁴, we agreed to allow it to be renewed under our name, even though Plant was running the job."⁵

In opposition to Plant, Bueti and WSC's respective motions to dismiss his Labor Law § 241 (6) cause of action, plaintiff initially notes that, as the owner of the units undergoing construction, WSC is subject to liability under the statute. In addition, plaintiff adopts Bueti's argument with respect to Plant's role on the project at the time of the accident. As such, plaintiff maintains that there is an issue of fact as to whether Plant was the general contractor at the time of the accident, which requires the denial of Plant's motion to dismiss plaintiff's Labor Law § 241 (6) claim against it. Finally, plaintiff maintains that he has a

⁴Giovanna is married to Laufer and is Serafino and Frank Bueti's niece.

⁵Bueti does not move to dismiss plaintiff's Labor Law § 241 (6) claim against it based upon the argument that it was not the general contractor at the time of the accident. In this regard, Bueti concedes that there is an issue of fact as to whether it or Plant was the general contractor when the accident occurred.

viable Labor Law § 241 (6) claim against WSC, Plant, and Bueti to the extent that he relies upon violations of 12 NYCRR 23-1.7 (e) (1) and (2).

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

“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 persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable, given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

As an initial matter, the court notes that the bulk of the evidence, including plaintiff's own deposition testimony, indicates that Bueti was the general contractor at the time of the accident. However, as noted above, Frank Bueti stated during the course of his deposition,

and Serafino Bueti avers in his sworn affidavit, that Bueti was replaced as the general contractor on the project by Plant before the accident. It is well-settled that “[o]n a motion for summary judgment the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine [and] [a]ny conflict in the testimony or evidence presented merely raise[] an issue of fact” (*6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449 [2006] [citations omitted]). Here, Frank and Serafino Bueti’s claim that Bueti was no longer the general contractor at the time of the accident is not inconsistent with any prior sworn statements on their part and, therefore, does not present a feigned issue of fact. Thus, there is an issue of fact regarding whether or not Plant was the general contractor when plaintiff was injured. Accordingly, Plant is not entitled to summary judgment dismissing plaintiff’s Labor Law § 241 (6) based upon its argument that it was not a contractor or agent under the statute.

Turning to Plant’s alternative argument, as well as Bueti and WSC’s main argument, in support of their respective motions for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim, the court initially notes that plaintiff has failed to address those branches of Plant, WSC, and Bueti’s motions which argue that 12 NYCRR 23-1.5 (a), 1.5 (b), 1.5 (c), 1.7 (a), 1.7 (b), 1.7 (c), 1.7 (d), 1.7 (f), 1.7 (g), and 1.7 (h) may not serve to support his Labor Law § 241 (6) claim. Accordingly, plaintiff has abandoned any reliance upon these Industrial Code regulations (*Videan v NRG Energy, Inc.*, 149 AD3d 1533, 1534-1535 [2017]). In any event, it is clear that these regulations are either inapplicable given the circumstances of the accident, or too general to support a claim under the statute.

Turning to the alleged violation of 12 NYCRR 23-1.7 (e) (1), this provision requires that “[a]ll passageways shall be kept free from . . . any . . . obstructions or conditions which could cause tripping.” According to plaintiff, the raised section of Masonite that caused him to fall was clearly a condition which could cause tripping. Plaintiff also contends that the doorway area in which he fell constituted a passageway inasmuch as he passed through this area 10 to 20 times immediately before the accident while moving his tools out of the closet. Finally, plaintiff maintains that this regulation is specific enough to support a Labor Law § 241 (6) cause of action.

Plaintiff argues that he also has a viable Labor Law § 241 (6) cause of action to the extent that he relies upon 12 NYCRR 23-1.7 (e) (2). This regulation, which pertains to tripping and other hazards, requires that “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.” In this regard, plaintiff notes that this regulation is sufficiently specific to support a Labor Law § 241 (6) claim. Plaintiff also argues that this regulation is applicable in this case. In particular, plaintiff argues that, although the Masonite itself may have been integral to the project, inasmuch as it was intentionally laid down in order to protect the hardwood floors, the fact that the edge of the Masonite was raised is what caused the tripping hazard, and there is no evidence that a raised sheet of Masonite (as opposed to a flat sheet) was necessary or inherent to the work.

In reply to plaintiff's opposition, Plant, Bueti and WSC all argue that 12 NYCRR 23-1.7 (e) (1) is not applicable inasmuch as plaintiff's accident did not take place in a passageway. In this regard, these defendants all point to the witness affidavit submitted by plaintiff himself. In this regard, James Thomas, who was working as a carpenter on the job at the time of the accident, states that plaintiff was performing electrical work in the living room of the apartment at the time of the accident and immediately after hearing plaintiff fall, he looked up and saw him lying on the floor of the living room near the piece of raised Masonite.

Turning first to the alleged violation of 12 NYCRR 23-1.7 (e) (2), it is clear that this regulation is specific enough to support a Labor Law § 241 (6) cause of action (*White v Village of Port Chester*, 92 AD3d 872, 877 [2012]). Further, contrary to defendants' argument, there is an issue of fact regarding whether this regulation is applicable in this case notwithstanding the fact that the Masonite that caused plaintiff to trip was installed as part of the underlying construction work. In this regard, relevant Second Department authority holds that 23-1.7 (e) (2) is applicable when a worker is injured as a result of a tripping or sharp object hazard arising out of construction materials when the hazardous condition itself is not an integral part of the work. For example, in *Lopez v New York City Dept. of Env'tl. Protection*, (123 AD3d 982 [2014]), the Second Department held that there was a 23-1.7 (e) (2) violation when the plaintiff was impaled on a piece of "uncapped" rebar. Similarly, in a case on point with the instant matter, the Second Department affirmed a lower court

determination which found that there was a triable issue of fact as to whether 23-1.7 (e) (2) was violated when the plaintiff tripped over a piece of “warped” plywood that had been intentionally laid down in a parking lot in order to protect the asphalt during construction work (*Giza v New York City School Constr. Auth.*, 2004 WL 5488367 [Sup Ct, Kings County 2004], *affd* 22 AD3d 800 [2005]).

Here, the Masonite itself was integral to the work inasmuch as it was needed to protect the wood floors. However, the hazardous condition present in the Masonite that caused the accident (i.e., the raised edge) was not integral to the work just as uncapped rebar in *Lopez* and the warped plywood in *Giza* were not integral to the work for purposes of 23-1.7 (e) (2). Accordingly, those branches of Plant, WSC, and Bueti’s motions which seek summary judgment dismissing plaintiff’s Labor Law § 241 (6) claims are denied to the extent that plaintiff relies upon a violation of 12 NYCRR 23-1.7 (e) (2).

With respect to the alleged violation of 12 NYCRR 23-1.7 (e) (1), it is undisputed that this regulation is sufficiently specific to support a Labor Law § 241 (6) claim. Further, as described by plaintiff in his deposition testimony, it is clear that the raised piece of Masonite constituted a tripping hazard under the regulation. Consequently, the applicability of this regulation depends upon whether or not plaintiff’s accident occurred in a passageway. Here, although plaintiff’s co-worker Mr. Thomas states in his affidavit that plaintiff fell in the living room, plaintiff himself testified that he fell in a doorway area between the living room and a hallway, which is sufficient to raise an issue of fact as to whether plaintiff fell in a

passageway (*Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [2013]; *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121 [2011]; *Kerins v Vassar Coll*, 293 AD2d 514 [2002]). Accordingly, those branches of Plant, WSC, and Bueti's motions which seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim are denied to the extent that plaintiff relies upon a violation of 12 NYCRR 23-1.7 (e) (1).

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

Laufer and WSC, as well as Plant and Bueti separately move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them. In support of its motion, Plant reiterates its argument that it was not the general contractor at the time of the accident. Plant also notes that it is undisputed that it did not create the alleged dangerous condition that caused plaintiff to trip. Under the circumstances, Plant maintains that it is not subject to liability under Labor Law § 200 and may not be held liable under a negligence theory since it did not create the dangerous condition or have a duty of care to protect against this condition. Alternatively, Plant argues that, even if it were the general contractor at the time of the accident, plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed against it. In support of this argument, Plant notes that it did not control the means and methods Tribeca used when it installed the Masonite. Further, to the extent that the raised Masonite is considered to be a dangerous condition, Plant maintains that it did not have actual or constructive notice of this condition. In support of this claim, Plant points out that plaintiff did not complain about the Masonite prior to the

accident, that plaintiff himself did not notice the raised Masonite during the 10 to 20 times he walked by this area immediately prior to the accident, and that Plant was only present at the job site once a week during the time period when the accident occurred.

In their respective motions to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against them, WSC and Bueti also argue that the accident arose out of the means and methods Tribeca used when it installed the Masonite and that they did not exercise any control and supervision over this installation work. In addition, these defendants maintain that they did not have notice of the raised piece of Masonite prior to the accident. In this regard, Bueti notes that plaintiff's supervisor Liam O'Connor testified that he did not find any problem with the flooring either before or after the accident.

In opposition to the defendants' respective motions to dismiss his Labor Law § 200 and common-law negligence claims, plaintiff initially argues that there is an issue of fact as to whether Plant was the general contractor at the time of the accident. In addition, plaintiff maintains that the defendants' arguments, that they did not control or supervise the installation of the Masonite, are insufficient to make a *prima facie* showing of their entitlement to summary judgment dismissing his Labor Law § 200 claim. In this regard, plaintiff notes that the Masonite was installed at least a month before the accident and therefore, it is unclear whether the hazard posed by the raised edge of Masonite was the result of the means and methods Tribeca used during installation or whether it was a dangerous condition that arose after Tribeca completed its work. Finally, plaintiff argues that the

defendants have failed to make a *prima facie* showing that they lacked constructive notice of the raised piece of Masonite inasmuch as they have offered no proof as to when they last inspected the Masonite flooring during the period leading up to the accident.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners [or contractors] may be held liable for a violation of Labor Law § 200 if the owner [or contractor] either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). On the other hand, "when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had authority to supervise or control the performance of the work" (*id.*). General supervisory authority to oversee the progress of the work is insufficient to impose liability. Rather, [a] defendant has the authority to supervise or control

the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed” (*Ortega*, 57 AD3d at 62).

As an initial matter, the court has already determined that there is an issue of fact as to whether Plant was acting as the general contractor at the time of the accident. Accordingly, Plant is not entitled to summary judgment dismissing plaintiff’s Labor Law § 200/common-law negligence claim based on the argument that it is not subject to liability under the statute.

Turning to the substance of plaintiff’s claim, to the extent that the accident arose out of the means and methods Tribeca used when it installed the Masonite, it is clear that there is no basis for plaintiff’s Labor Law § 200 or common-law negligence claims against Plant, Bueti, WSC, or Laufer inasmuch as they did not exercise control and supervision over Tribeca’s work. However, contrary to the moving defendants’ argument, it is unclear whether the raised edge that caused the accident was the result of the manner in which Tribeca installed Masonite, or whether this condition arose after Tribeca completed its work. In this regard, Tribeca installed the Masonite at least a month prior to the accident and there is no evidence that the Masonite edge was raised at the time of installation (*compare Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196 [2012] [accident caused by general contractor’s failure to tape down Masonite during installation process the day before the accident arose out of the manner in which the general contractor performed its work]). Under the circumstances, the trier of fact could determine that the raised edge of Masonite

constituted a dangerous condition which was unrelated to the installation methods used by Tribeca.

As noted above, owners and general contractors moving to dismiss a Labor Law § 200 claim which arose out of a dangerous condition must demonstrate that they did not create or otherwise have actual or constructive notice of the condition. Here, it is clear that the moving defendants did not create the raised tripping condition. It is also clear from the deposition testimony that these defendants did not have actual knowledge that the edge of the Masonite was raised. Thus, the issue here is whether or not Plant, WSC, Laufer, and Bueti had constructive notice of the raised edge of Masonite. In order to demonstrate lack of constructive notice, a defendant moving for summary judgment must offer some evidence as to when it last inspected the area in question relative to the time that the accident occurred or otherwise demonstrate that a reasonable inspection would not have revealed the condition (*Hanney v White Plains Galleria, LP*, 157 AD3d 660, 662 [2018]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [2015]; *Pryzywainy v New York City Trans. Auth.*, 69 AD3d 598, 599 [2010]). Here, none of the moving defendants have introduced evidence regarding when they last inspected the Masonite covering the flooring in the area where the accident took place. Further, there is an issue of fact as to whether the raised piece of Masonite would have been revealed by such an inspection. In particular, Liam O'Connor testified that he did not notice any problem with the flooring when he inspected the area after the accident. However, plaintiff testified that after the accident, he noticed that the edge of

the Masonite was raised approximately one-half to one inch. Similarly, Mr. Thomas states in his affidavit that immediately after the accident, he noticed a lose piece of Masonite that was raised half an inch to an inch.

Accordingly, Plant, WSC, Laufer, and Bueti's motions to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against them are denied.

Third-Party Claims

Bueti, Laufer, and WSC move to dismiss all cross claims asserted against them. However, their respective motion papers contain no discussion of the nature of these cross claims or any analysis as to why they should be dismissed. Accordingly, those branches of these defendants' respective motions which seek summary judgment dismissing the cross claims asserted against them are denied. Finally, Plant moves for summary judgment dismissing Bueti's third-party action and all cross claims asserted against it. In so moving, Plant maintains that the accident was not caused by any negligence on its part. However, the court has already determined that there are issues of fact regarding whether or not Plant was the general contractor at the time of the accident and whether or not it had constructive notice of the tripping hazard that caused the accident. Accordingly, Plant's motion to dismiss the third-party action and all cross claims against it is denied.

Based on the foregoing, it is hereby ORDERED as follows:

(1) that branch of WSC and Laufer's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against Laufer is granted;

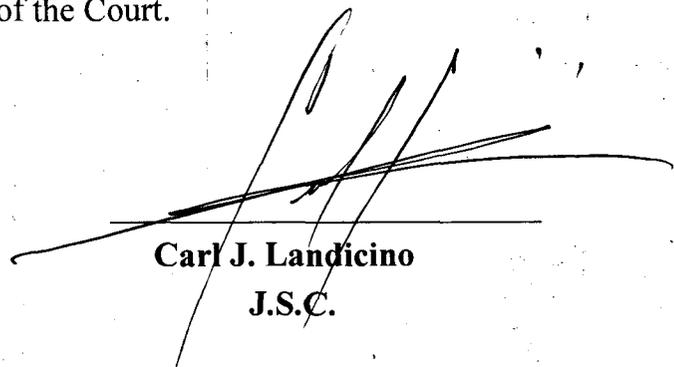
(2) those branches of Plant, Bueti, and WSC's respective motions which seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them are denied to the extent that plaintiff relies upon alleged violations of 12 NYCRR 23-1.7 (e) (1) and (2);

(3) those branches of Plant, Bueti, WSC and Laufer's respective motions which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them are denied; and

(4) those branches of Plant, Bueti, WSC and Laufer's respective motions which seek summary judgment dismissing all cross claims and third-party actions against them are denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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