SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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INDEX NO. 150167/2016

PAUL DEMERCURIO,

MOTION DATE 07/24/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

605 WEST 42ND OWNER LLC,TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Motion decided per the annexed memorandum of decision and order.

August 8, 2018
DATE

HON. ROBERT D. KALISH

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
APPLICATION:	X	GRANTED		DENIED	GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 29

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PAUL DeMERCURIO,

Plaintiff, Index No. 150167/2016

- against -

605 WEST 42ND OWNER LLC and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

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KALISH, J.:

This is an action to recover damages for personal injuries allegedly sustained by a journeyman electrician on September 29, 2015, when he slipped on brown paper that had been placed on the floor of an apartment under construction at 605 West 42nd Street, New York, New York (the Premises). Defendants 605 West 42nd Street Owner LLC (605 West) and Tishman Construction Corporation of New York (Tishman, and, together with 605 West, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. For the reasons stated herein, the motion is granted.

BACKGROUND

605 West is, and was, the owner of the Premises where the accident occurred. Prior to the accident, 605 West retained Tishman to construct a 63-story apartment building at the Premises (the Project). Tishman, as general contractor, then hired plaintiff's employer, nonparty Spieler & Ricca Electric Co., as the electrical subcontractor for the Project.

Plaintiff's Deposition Testimony

Plaintiff Paul DeMercurio testified that, on the day of the accident, he was assigned to identify, troubleshoot and repair nonfunctioning electrical systems at the Premises. Plaintiff stated that the accident occurred while he was repairing an electrical circuit, or BX cable line, in a

seventh-floor apartment at the Premises. The electrical line ran underneath the living room floor to two outlets at the base of a window. Plaintiff explained that, to test the electrical line, he first had to remove a base mullion that had been installed over the window frame. He described the base mullion as a decorative covering made from aluminum that "just snaps in" to a "long groove" over the window frame (plaintiff's tr at 77-78). Plaintiff testified that he had removed base mullions installed in other apartments at the Premises by using "screwdrivers, pry bars, [and] whatever [he] could use to try and pop them off" (*id.* at 80-81). He described the pry bar that he used as a 12-inch to 18-inch long flat metal bar with a hook at one end.

Plaintiff explained that the floors in the apartment were covered in "brown standard protective paper" (*id.* at 99). He testified that laborers laid paper over the finished floors in each apartment as a temporary protective covering. They removed the paper once the apartment was painted. Although the laborers used either blue or yellow masking tape to secure the paper to the floor, the paper in the area where the accident occurred was "kind of torn up" (*id.* at 100, 184). In addition, several sections were no longer taped to the floor.

Plaintiff stated that the accident occurred as he tried to remove a base mullion in the living room with a pry bar. Plaintiff testified that, as he slid the hook end of the pry bar underneath the base mullion, he fell back when "the paper went out from underneath [him] on the floor" (*id.* at 98).

Plaintiff noted that he saw fine green dust on top of and underneath the paper at the accident location. He described the green dust as a cleaning product that laborers sprinkled on the ground in high-dust areas so that construction dust did not rise into the air. Although plaintiff maintained that he never saw laborers sprinkling the cleaning agent on the floor of the apartment where the accident occurred, he saw the cleaning agent everywhere at the Premises.

At his deposition, plaintiff was shown a color photograph of the accident location that he had taken on the day of the accident. Plaintiff testified that the photograph depicted an exposed area of the wood floor and torn paper. Plaintiff also testified that did not see any green dust on the floor in the photograph. However, plaintiff maintained that the colors in the photograph were distorted and concluded that the "distortion [could] hide the green dust" (*id.* at 186).

Plaintiff identified Tishman as the general contractor on the Project. He testified that he never dealt with anyone from either Tishman or 605 West.

Deposition Testimony of Michael Tereskiewicz (Tishman's Second Superintendent)

Michael Tereskiewicz testified that he was employed by Tishman as the second superintendent in charge on the Project. Tereskiewicz stated that each trade was directed not to touch another trade's work. As such, when an electrician needed access to electrical wiring that had been placed under a base mullion, the window contractor would have been called to remove the base mullion. Tereskiewicz was not aware that plaintiff had attempted to remove the subject base mullion before the accident.

Tereskiewicz testified that Broad Construction (Broad) provided laborers for the Project, and that the laborers were supervised by Broad's foremen. Tereskiewicz explained that once nonparty National Flooring finished installing the wood floors, Broad's laborers taped protective paper over the finished floors "[s]o that they didn't get scratched" (Tereskiewicz tr at 42). The protective paper, which was taped at the seams onto the floor, was removed "once paint was done" (*id.* at 44). Broad's foremen were responsible for walking the Premises daily to ensure that the protective paper coverings were in place. Tereskiewicz noted that it was the obligation of each trade's foreman to advise Tishman if any protective paper needed to be repaired or replaced. He stated that "[if] something happened to the protection . . . [he would] send a [laborer from Broad] up there to fix it" (*id.* at 45).

Tereskiewicz also testified that the laborers spread green dust over the floor keep other dust generated during the construction work from rising into the air as they swept. Tereskiewicz maintained that the green dust had no effect on traction, nor did it make the floor more slippery.

DISCUSSION

It is well settled that the movant on 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 motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of a genuine issue of material fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

The Labor Law § 240 (1) Cause of Action

Defendants move for summary judgment dismissing the Labor Law § 240 (1) cause of action.

Labor Law § 240 (1) provides, in pertinent part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes,

> and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

It is well settled that "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [stating that "the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials"]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" [*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011] [internal quotation marks omitted]).

Labor Law 240 § (1) also "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). Nevertheless, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" for the Labor Law § 240 (1) violation (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Here, defendants have established that Labor Law § 240 (1) does not apply to the facts of this case because the accident did not involve an elevation-related risk (*see German v Antonio Dev., LLC*, 128 AD3d 579, 579 [1st Dept 2015), nor did it involve "the direct consequence of the application of the force of gravity to an object or person" (*Gasques v State of New York*, 15 NY3d 869, 870 [2010]). Moreover, plaintiff did not address this cause of action in his opposition.

As such, the Labor Law § 240 (1) cause of action is dismissed as against defendants.

The Labor Law § 241(6) Cause of Action

Defendants move for summary judgment dismissing the Labor Law § 241 (6) cause of action.

Labor Law § 241 (6) reads, 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:
>
> * * *
>
> "(6) 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."

The statute imposes a duty upon owners, 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]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing

Ross, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) cause of action, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]). The injury also must have occurred "in an area in which construction, excavation or demolition work is being performed" [*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [internal quotation marks omitted]).

Although plaintiff alleges violations of Industrial Code sections 23-1.7 (d), 23-1.7 (e), and 23- 3.3 (c) in his bill of particulars, he addressed only section 23-1.7 (d) in his opposition. Therefore, plaintiff has abandoned his reliance on the other Industrial Code provisions as predicates for the Labor Law 241 § (6) cause of action (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013]; *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009]). In any event, those sections are inapplicable as plaintiff did not testify that he tripped, nor did the work involve any demolition by hand.

As such, defendants are entitled to summary judgment dismissing those parts of the Labor Law § 241 (6) cause of action predicated on those abandoned provisions.

Industrial Code 12 NYCRR § 23-1.7(d)

Section 23-1.7 (d) (Protection from slipping hazards) states:

> "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."

Section 23-1.7 (d) is sufficiently specific to serve as a predicate for a Labor Law § 241 (6) cause of action (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]).

Here, section 23-1.7 (d) is inapplicable to the facts of this case because the brown paper that plaintiff slipped on was not a "foreign substance" for purposes of this provision, but, rather, it was integral to the ongoing work at the time of the accident in that it was necessary to protect the wood floor during construction. A substance that is deemed integral to the work does not constitute a "foreign substance" under section 23-1.7 (d) [*see Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2d Dept 2008], *lv denied* 12 NY3d 709 [2009] [collecting cases]).

For example, in a case with similar facts, in *Stier v One Bryant Park LLC* (2012 NY Slip Op 32535[U], *3 [Sup Ct, NY County 2012], *affd* 113 AD3d 551 [1st Dept 2014]), the plaintiff slipped on an unsecured piece of Masonite that had been placed over a vinyl laminate floor to protect it "from foot and wheel traffic during the construction process." The Court determined that the masonite was "not a slipping hazard contemplated by 12 NYCRR 23-1.7 [d]" because it was not a foreign substance (*Stier*, 113 AD3d at 552, citing *Croussett v Chen*, 102 AD3d 448, 448 [1st Dept 2013]). The masonite was intentionally placed on the floor as a protective covering (*Stier*, NY Slip Op 32535[U] at *3) and, therefore, was integral to the work (*see Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215 [2d Dept 2017] [stating that the "protective rosin paper upon which the plaintiff slipped was an integral part of the tile work" and therefore did not constitute a foreign substance]; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2012] [finding that "the protective covering [over which plaintiff tripped] had been purposefully installed on the floor as an integral part of the renovation project"]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [1st Dept 2010] [stating that the "brown construction paper that was purposefully laid over newly installed floors to protect them . . . constituted an integral part of the floor work"]).

It should also be noted that plaintiff also attributes the accident, in part, to the presence of the green cleaning agent underneath the protective paper. To that effect, he argues that the cleaning agent caused the protective paper on which he was standing to slip. However, as with the brown protective paper, the presence of the cleaning agent on the floor was also intentional and integral to the work being performed on the Project. Both plaintiff and Tereskiewicz testified that laborers purposefully spread the cleaning agent on the floor to keep construction dust and debris from rising into the air.

As such, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) cause of action predicated on an alleged violation of Industrial Code section 23-1.7 (d).

The Common-Law Negligence and Labor Law § 200 Causes of Action

Defendants also move for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action.

Labor Law § 200 (1) provides, in relevant part:

> "All 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 statute codifies the common-law duty that an owner or general contractor provide construction workers with a safe worksite (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Causes of action brought under Labor Law § 200 "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous condition, liability may be imposed if the defendant created the condition or failed to remedy a

condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). If the accident results from the means and methods of the work, liability may be imposed only if defendant supervised or controlled the injury-producing work (*see Cappabianca*, 99 AD3d at 144).

As discussed previously, plaintiff slipped on brown paper that had been laid purposefully on top of the floor where the accident occurred. In addition, as with the brown paper, the green cleaning agent was intentionally spread over the floor to keep construction dust from rising into the air. Consequently, the condition arose from the manner in which Broad performed its work (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018] [stating that "[w]here a defect is not inherent but is created by the manner in which the work is performed, the cause of action under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises"]; *Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012], *lv dismissed* 19 NY3d 1020 [2012]), rather than a dangerous condition inherent to the property (*see Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

Here, defendants have established that they did not supervise or control the work that caused the accident, i.e., the placement of either the brown paper or the cleaning agent on the floor of the apartment. In fact, Tereskiewicz testified that Broad's two foremen were directly responsible for supervising the laborers who placed the brown paper on the floor and for removing the green cleaning agent. Tereskiewicz's testimony also shows that Tishman exercised only general supervision over the work, which is insufficient to impose liability (*see Villanueva*, 162 AD3d at 406, citing *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306-307 [1st Dept 2007]).

As such, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 causes of action against them.

The court has reviewed plaintiff's remaining contentions on this issue and finds them to be unavailing.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants 605 West 42nd Owner LLC and Tishman Construction Corporation of New York pursuant to CPLR 3212 for summary judgment dismissing the complaint against them is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that movants shall, within 20 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry upon plaintiff Paul DeMercurio and upon the Clerk, who is directed to enter judgment accordingly.

Dated: Aug 8, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.