SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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THOMAS SANDE and MAYDELLE SANDE,

Plaintiffs,

- v -

TRINITY CENTRE LLC,
TRICON CONSTRUCTION LLC, and
JOS A. BANK CLOTHIERS, INC.,

Defendants.

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INDEX NO. 150208/2014

MOTION DATE 01/31/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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TRICON CONSTRUCTION LLC

Plaintiff,

-against-

A.C. ELECTRIC OF NEW YORK, INC

Defendant.

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Third-Party
Index No. 595316/2014

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72

were read on this motion for SUMMARY JUDGMENT.

Silberstein, Awad & Miklos, P.C. (John J. Gabriel, Jr. of counsel), for plaintiffs.
Law Office of James J. Toomey (Patrick McConnell of counsel), for defendants.
Law Offices of Kevin P. Westerman (Christopher M. Otton), for third-party defendant.

Gerald Lebovits, J.:

In this action for personal injuries asserting labor law violations, plaintiffs, Thomas M. Sande, Jr. (plaintiff) and Maydelle Sande, move for partial summary judgment on their causes of action for Labor Law §§ 200 and 241 (6) and common law negligence. Defendants Trinity Centre, LLC (Trinity), Tricon Construction LLC (Tricon), and Jos A. Banks Clothiers, Inc. (Jos) and third-party defendant A.C. Electric of New York, Inc. (A.C.) oppose the motion.

BACKGROUND

Plaintiff Thomas M. Sande, Jr. alleges that, on January 24, 2011, he was injured in an accident while working on a construction site located at 111 Broadway, New York, New York

(the building). Plaintiff was working as a journeyman electrician for A.C. for the construction of a new Jos clothing store (the jobsite) at the building (the project). Trinity was the owner of the building and Jos was the tenant in possession pursuant to a lease with Trinity. Tricon was the general contractor for the project.

Plaintiff testified at his deposition that he had been working on the project for two or three days before the accident (plaintiff tr at 9). He was doing basic electrical work renovations (*see id.* at 14). He had a foreman at the project but does not remember the foreman's name (*see id.* at 12). He would arrive at the jobsite, report to the foreman at the gang box, and get his instructions for the day (*see id.* at 148).

On the date of the accident, he was working on the ground floor level (*id.* at 145). The foreman took him into a small room to show him the junction box he would be working on, which was in the ceiling above the entranceway of the room (*see id.* at 155, 157, 161-162). When he walked into the room with the foreman, he saw a pile of debris to the left (*see id.* at 157). He set up a ladder under the junction box with the entranceway on his right and the pile of debris a few feet behind him ((*see id.* at 165). Five minutes before the accident, he was on the ladder working on the junction box and preparing it for the pipes that were coming into it and tracing out some circuits in it (*see id.* at 15-16, 18-19). At some point, he descended the ladder to move to a different location to work next on the other side of the junction box (*see id.* at 16). The ladder was in an open position and he pulled the ladder towards himself while walking backwards (*see id.* at 16). While walking backwards, he noticed some broken concrete on the floor to his right, an HVAC jack to his left, and debris that appeared to be insulation, sheetrock, and general construction debris to his right (*see id.* at 16). While he was walking backward, he was pushing the debris with the back of his heels (*see id.* at 20). It was his intention to move the pile of debris with his feet in order to move the ladder (*see id.* at 34). There was no reason why he did not use another method to move the pile of debris other than pushing it with his feet (*see id.* at 20). While he was walking backward, his right foot got stuck on something that was under the debris (*see id.* at 16, 181). He did not know what it was at the time, but it caught his right heel / back of foot which caused him to fall to the ground injuring himself (*see id.* at 16, 182). There was no one else in the room at the time of the accident (*see id.* at 182). A helper and the foreman came to his assistance (*see id.* at 30).

Plaintiff testified that after he fell, he was lying on his back and saw that there was a raised metal electrical box about four inches by four inches in length and width that was affixed to the floor about two inches high (*see id.* at 31-33, 187). The pile of debris had prevented him from seeing the box as the debris was about two-and-a-half feet high and three by three feet in size and covering the box (*see id.* at 34). He does not know how long the debris had been on the ground before his accident or how it got there (*see id.* at 17-18). He saw other piles of debris within a 50-foot radius of where he was working, and there was debris all over the jobsite (*see id.* at 26, 38).

Plaintiff also testified that when he first set up the ladder, it was not in contact with the debris pile (*see id.* at 169). When he first entered the room where the accident occurred, he did not say anything to the foreman about the debris pile nor did he point it out to the foreman (*see*

id.). He never asked anyone to clean up the debris pile (*see id.*). Before his accident he never made complaints about the working conditions of the jobsite to anyone (*see id.* at 14).

Deposition Testimony of Richard Carlucci, Vice-President of Tricon

Richard Carlucci testified during his deposition that he was a vice-president and general manager for Tricon (Carlucci tr at 13). At the time of plaintiff's accident, Tricon was involved in the project working for its client, Jos (*see id.* at 13). Chad Moran was the project manager and Mitch Robin was the project superintendent (*see id.* at 18). Moran was at the jobsite sporadically while Robin was at the jobsite on a daily basis (*see id.* at 18-19). He does not recall having spoken with Moran or Robin about plaintiff's accident, and he never spoke to anyone with personal knowledge of the accident (*see id.* at 31).

Carlucci testified that Tricon always retained a subcontractor for debris removal (*see id.* at 43). He believes that Tricon required its subcontractors to put their own debris on a cart at the jobsite (*see id.* at 54). If a pile of debris was located in a room, that might be something designated by a superintendent (*see id.* at 54). He did not know of any witnesses to the accident and never spoke to anyone from A.C. about the accident (*see id.* at 47). There was no one still employed at Tricon with knowledge of operations about the project and Moran and Robin were no longer employees (*see id.* at 19, 45-46).

Deposition Testimony of Duljo Bogdanovic, A.C. Superintendent

Duljo Bogdanovic testified during his deposition that he was a superintendent for A.C. and in 2011, he was assigned to the project (Bogdanovic tr at 8). He did not know plaintiff (*see id.* at 14-17). He does not remember any accidents occurring during the project (*see id.* at 11).

Deposition Testimony of Cvetan Pavlovic, Foreman for A.C.

Cvetan Pavlovic testified during his deposition that he was the foreman for the project (Pavlovic tr at 8). He does not remember plaintiff, but he remembers there was an accident at the jobsite for which he called 911 (*see id.* at 8, 12). He did not remember seeing plaintiff's accident (*see id.* at 22).

Pavlovic further testified that if an electrician at the jobsite encountered a situation where he could not reach a certain work location because of an obstruction that he would expect the electrician to notify the foreman about the situation (*see id.* at 23). He did not recall any electrical floor boxes at the jobsite (*see id.* at 28). He does not recall seeing any piles of debris at the jobsite (*see id.* at 46). He never spoke to anyone who saw the accident (*see id.* at 41). He has not seen any photographs of the accident location (*see id.* at 41).

Deposition Testimony of Lawrence Parente, Estimator for A.C.

Lawrence Parente testified during his deposition that he was an estimator for A.C. (*see* Parente tr at 9). He does not recall plaintiff (*see id.* at 10). He does not remember observing piles of debris at the jobsite (*see id.* at 21). At a union project, the trades would pile debris in a neat pile to be removed by another contractor (*see id.* at 18). The general contractor would decide where the piles of debris would be placed (*see id.* at 23).

DISCUSSION

"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" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 200 and Common-law Negligence Claims

Plaintiffs move for summary judgment on their Labor Law § 200 and common-law negligence claims in their favor. Labor Law § 200 (1) provides:

> "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 board may make rules to carry into effect the provisions of this section."

It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), and, therefore, the same standards apply to both Labor Law § 200 and common-law negligence theories of recovery. "Liability pursuant to Labor Law § 200 may fall into two broad categories: workers 'injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed'" (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Plaintiffs argue that defendants had constructive and actual notice of the defective condition of the electrical box and debris covering it. Defendants and A.C. oppose this branch of the motion arguing that plaintiffs did not make a prima facie showing that defendants caused or

created the defective condition or had constructive notice of it. When an injury arises out of a dangerous or defective premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). To prevail on a claim under Labor Law § 200 and common-law negligence, where the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). General supervision over the work, including coordination of the trades and inspection of quality of the work, is insufficient to impose liability (*see Hughes*, 40 AD3d at 306).

Plaintiffs' branch seeking partial summary judgment on the Labor Law § 200 and common-law negligence claims is denied. Plaintiffs failed to establish prima facie that defendants either created the alleged dangerous condition or that they had notice of it prior to the accident. Plaintiff does not know how long the pile of debris was present or how the debris got there (*see* plaintiff tr at 17-18, 38). He did not complain about the pile of debris or point it out to the foreman when he noticed it upon entering the room where his accident occurred (*see id.* at 169). Also, no safety complaints were made to defendants prior to the accident (*see Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549, 550 [1st Dept 2012]). Plaintiff's contention that Tricon exercised control of the jobsite as the general contractor and that Robin walked the jobsite daily is not sufficient to demonstrate that defendants created the alleged defective condition or had actual or constructive notice of it. Assuming arguendo that plaintiffs met their prima facie burden, there are still questions of fact regarding the electrical box, how long the pile of debris was present, how the pile of debris was created, and what actually happened as plaintiff was the only witness to the accident and there are no photographs. Therefore, this branch of plaintiffs' motion is denied.

Labor Law § 241 (6) Claim

Plaintiffs move for summary judgment on their Labor Law § 241 (6) claim in their favor. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. . . ."

Labor Law § 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]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 505).

12 NYCRR § 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."

Here, 12 NYCRR § 23-1.7 (e) (2) is inapplicable because plaintiff testified that he tripped on an electric floor box not debris (plaintiff tr at 181, 182, 187). Also, the box on which plaintiff allegedly tripped was consistent with the work being performed as it was a pre-existing floor box which was not to be removed (*see generally, Kinirons v Teachers Ins. & Annuity Assn. of Am.*, 34 AD3d 237 [1st Dept 2006]; *Vieira v. Tishman Constr. Corp.*, 255 AD2d 235 [1st Dep't 1998]).

Plaintiff also relies on industrial code provision 12 NYCRR § 23-3.3 (k). This provision states the following:

> "Storage of materials. (1) General.
>
> "(i) Materials shall not be stored on catch platforms, scaffold platforms, floors or stairways of any building or other structure being demolished, except that any such floor may be used for the temporary storage of materials when such floor is of such strength as to safely support the load to be imposed.
>
> "(ii) Storage areas shall not interfere with access to any stairway or passageway used by any person as a means of ingress or egress. Suitable barricades shall be provided to prevent stored materials from sliding or rebounding into any area where any person is located or passing. All materials shall be safely piled in such locations as will not interfere with any work operations nor present any hazard to any person employed at or frequenting the demolition site.
>
> "(2) Storage of debris or materials in cellars. When debris or materials are stored in the cellar or basement of any building or other structure being demolished, such debris or materials shall not be in piles which extend higher than the top of the foundation wall. The person in charge of the demolition operations shall provide sheet-piling, shoring, bracing or such other means as may be necessary to insure the stability of such foundation walls and to prevent any such wall from collapsing due to the pressure of the accumulated debris or materials."

This provision is inapplicable on its face as it provides for regulation of storage of materials during demolition operations, and demolition was not being performed during plaintiff's accident. Furthermore, 12 NYCRR § 23-3.3 (k) (i) and (ii) do not mention debris, and 12 NYCRR § 23-3.3 (k) (2), the only part that specifically mentions debris refers to storage in a cellar or basement which is not where plaintiff was working at the time of his accident. Therefore, this branch of plaintiffs' motion is denied.

The affidavit of plaintiff's expert John Coniglio is of no moment as it is conclusory and speculative. An expert's evidence must be based on facts in the record or personally known to the witness (*see Oboler v City of New York*, 31 AD3d 308 [1st Dept 2006]). Here, Coniglio does not have firsthand knowledge of cleanup procedures and the deposition testimony is not informative on this issue. Furthermore, it is reversible error to permit a party to attempt to prove negligence by expert testimony regarding the meaning and applicability of a statute imposing a standard of care (*see Rodriguez v New York City Hous. Auth.*, 209 AD2d 260 [1st Dept 1994]). To the extent that Coniglio's expert opinion is that defendants violated the Labor Law, that opinion cannot be considered by the court (*see Elejaz v Carlin Constr.*, 225 Ad2d 441 [1st Dept 1996] [holding that the trial court erred to the extent it relied on an engineer's expert opinion in determining whether Labor Law § 240 applied to the particular circumstances of the plaintiff's accident]). The court has considered the remaining arguments and finds them unavailing.

Accordingly, for the foregoing reasons it is

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that the parties appear for a status conference in Part 7 of this court, Room 345, 60 Centre Street, on January 15, 2020, at 10:00 a.m.

11/04/2019
DATE

GERALD LEBOVITS, J.S.C.

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