To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JAIME ORTEGON-LEON,

Plaintiff,

-against-

RESTREPO CONSTRUCTION LLC.,

Defendant.

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RESTREPO CONSTRUCTION LLC.,

Third-Party Plaintiff,

-against-

DSM HOME IMPROVEMENT, INC. and
JOHN F. RIOS d/b/a JOHN RIOS PAINTING,

Third-Party Defendants.

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INDEX NO. 60533/2017

DECISION/ORDER

Mot. Seqs. 2, 3
Motion Date 11/13/2019

Ecker, J.

The following papers were considered on the motion of defendant RESTREPO CONSTRUCTION LLC. (Restrepo) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and counterclaims, and the cross-motion of third-party defendant JOHN F. RIOS d/b/a JOHN RIOS PAINTING (Rios) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the third-party complaint:

PAPERS

Notice of Motion, Affirmation, Exhibits A-W, and Memorandum of Law
Notice of Cross-Motion, Affirmations (2), Exhibit A and Memorandum of Law in Support of Cross-Motion
Plaintiff's Affirmation in Opposition as to Motion and Cross-Motion [1]
Restrepo Affirmation in Reply and Exhibit A
Restrepo Affirmation in Partial Opposition to Cross-Motion and in Support of Motion

[1] Restrepo argues that plaintiff filed opposition papers one day later than the law date as set forth in the stipulation "so ordered" by the Court (Lefkowitz, J.). The court will exercise its discretion and excuse the tardy filing pursuant to its authority pursuant to CPLR 2004, and in furtherance of the public policy that matters are best decided on the merits.

Upon the foregoing papers, the court determines as follows:

Restrepo was hired as the general contractor to perform renovation and improvements to a one family residence in Valhalla (the Project). Restrepo thereafter sub-contracted with DSM Home Improvement, Inc. (DSM) [2], delegating to DSM the entirety of the work to be performed. DSM contracted with Rios to perform the painting work. Plaintiff was originally in the employ of DSM, but during the course of the Project work, he was hired by Rios as a painter.

On August 16, 2016, plaintiff and co-worker Jose Rios were preparing the walls in one of the rooms of the residence. Plaintiff was using a piece of sandpaper. The two co-workers were standing on a platform that was 3 to 4 feet from the floor, supported on each end by A-frame ladders. Plaintiff was able to ascend onto the platform directly from the floor without having to use either ladder.

During the course of his work, he stopped to descend the platform, after completing the sanding where he had been working. Plaintiff looked over his shoulder, stepped down with his right foot onto the floor, felt "something was on the floor," "got tangled with something that was on the floor," and fell backwards, causing the injuries that are the subject of this action.

Plaintiff is not able to describe what his right foot felt or the cause of his fall. He described the room where he was working as having "wood that the carpenter left behind. There were tools. There were electrical installations. There were cans of paint. There were boxes with tiles. It was very disarrayed, the whole room." Plaintiff consistently confirms that he does not know what it was on the floor that could have caused the fall, or whether it was a liquid substance or solid object.

Rios was not in the room when plaintiff fell. He returned to the room an hour after plaintiff's fall and the room was empty. The facts, as herein summarized, are not disputed.

The complaint alleges causes of action for negligence, violations of Labor Law 200, 240(1) and 261(6), with numerous sections of the Industrial Code. In the affirmation in opposition, plaintiff withdraws all claims with the exception of the Labor Law 200(1) and 241(6) claims, and as to the latter, withdraws all Industrial Codes except Industrial Code 12 NYCRR 23-1.7(e)(2).

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[2] By order of the court dated January 24, 2019, a default judgment was granted to Restrepo as against DSM.

Restrepo filed an answer alleging general denials and affirmative defenses of: Article 14; comparative negligence; failure to state a cause of action; superseding causes; failure to mitigate damages; sole proximate cause of accident; recalcitrant worker; CPLR 1601; CPLR 4545; and General Obligations Law 15-108. [NYSCEF No. 5].

Restrepo filed the third-party action alleging a cause of action: for breach of contract against DSM; for indemnification as against DSM and Rios; and for contribution against DSM and Rios.

Rios filed an answer with affirmative defenses, counterclaims against Restrepo for contribution and indemnification, and cross-claims against DSM for contribution and indemnification. [NYSCEF No. 14].

On or about April 10, 2018, Restrepo filed a reply denying Rios' counterclaims. [NYSCEF 15].

Initially, the court notes that the issues of indemnification and contribution are moot if it is determined that plaintiff has no sustainable cause of action against Restrepo for Labor Law 200(1) negligence (common law negligence) or Labor Law 240(6) and the concomitant Industrial Code violation. Hence, the court must first determine whether the complaint can withstand the motion for summary judgment.

It is well-settled that the proponent of the 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 (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.,* 155 AD3d 605 [2d Dept 2017]). Importantly, once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp., supra; Alvarex v Madeline D'Anthony Enterprises, Inc.v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *see De Souza v Empire Transit Mix, Inc., supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York, supra*; *Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

Motion of defendant Restrepo [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and counterclaims.

Labor Law 200

In order for liability to be imposed for violations of Labor Law 200 (1) and common-law negligence, the violations or negligence must be a proximate cause of the accident (*DiSanto v Spahiu*, 169 AD3d 167 [2d Dept 2019]; *Steinsvaag v City of New York*, 96 AD3d 932, 933 [2d Dept 2012]). Proximate cause may be established without

direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action (*DiSanto v Spahiu*, *supra*; *Steinsvaag v City of New York, supra*).

Here, based on plaintiff's own testimony, Resipo demonstrates, *prima facie*, that plaintiff was unable to identify the source of the materials on his boot, or the cause of his fall, without engaging in speculation (*DiSanto v Spahiu*, *supra*; *see Steinsvaag v City of New York, supra*; *see Grande v Won Hee Lee*, 171 AD3d 877 [2d Dept 2019]). Furthermore, based on plaintiff's testimony, Restrepo shows, *prima facie*, that the debris that was present on the subject construction site was an open and obvious condition that was readily observable by the reasonable use of one's senses, and which was not inherently dangerous (*see DiSanto v Spahiu*, *supra*; *Ulrich v Motor Parkway Props., LLC,* 84 AD3d 1223 [2d Dept 2011]).

In opposition to Restrepo's showing, plaintiff fails to raise a triable issue of fact. Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation (*Grande v Won Hee Lee*, *supra*). To the extent plaintiff alleges that there was construction debris on the floor of the room where he was working, that allegation is insufficient to constitute an identification of the cause of the fall. He cannot identify a specific object, whether solid or liquid, that was the instrumentality[3]. Simply put, plaintiff has not alleged or demonstrated that he is able to identify the cause of his fall beyond speculation.

The case of *DiSanto v Spahiu*, 169 AD3d 861 [2d Dept 2019] is instructive. In *DiSanto*, the plaintiff slipped and fell from the back of a truck he was using to make deliveries to a construction site. He parked his truck on the street where he observed an oily substance on the street in front of the construction site. He walked onto the construction site and made his delivery. There was dirt and sand "all over the place" at the construction site, and he could not avoid walking over it. He did not recall seeing oil on the construction site. After making the delivery he returned to the truck and climbed into the bed of the truck to retrieve an invoice. As plaintiff attempted to descend a ladder on the side of the truck, he slipped of the tailgate of the truck and fell about four feet to the street below. After he fell, he noticed oil on the tread of his right boot. He also observed dirt and sand in the tread of his right boot. He filed an action against the owner of the construction site for violation of Labor Law 200(1). In granting the owner's motion for summary judgment, the Court stated:

> "Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work . . . Where, as here, the plaintiff

[3]It is curious that Rios, in his deposition, was not asked to describe what the condition of the floor was when he left the room prior to plaintiff's fall. It is unclear why, if there was debris on the floor at the time of plaintiff's accident, one hour later, upon Rios' return to the room, the room was clear.

> alleges the existence of dangerous or defective premises conditions at a work site, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident . . . However, liability may not be imposed where the condition on the property was, as a matter of law, an open and obvious one that was readily observable by the reasonable use of one's senses, and not inherently dangerous."

The Court made findings that the sand and dirt present on the construction site was an open and obvious condition that was readily observable by the reasonable use of one's senses, and which was not inherently dangerous. Further, plaintiff was unable to identify the source of the materials on his boot, or the cause of his fall, without engaging in speculation. Accordingly, the Court held that the motion for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law 200 were appropriately granted.

Similarly, here, giving plaintiff the benefit of the doubt, plaintiff was working on the platform from 7:00 a.m. and stepped down from the platform at 9:00 a.m. During that time, plaintiff had more than ample opportunity to observe what construction materials, if any, were readily observable in the immediate area of the work. Yet, plaintiff was not able to identify or describe whether what he felt on the floor was a liquid or a solid, and he was unable to state that what he observed on the floor of the room where he was working was in the immediate vicinity of his fall, or that the object was inherently dangerous. As such, plaintiff, like the plaintiff in *DiSanto v Spahiu*, submits only "speculative and insufficient" facts that are incapable of raising a triable issue of fact.

Labor Law 241(6)

As to the Industrial Code violation, 12 NYCRR 23-1.23(e)(2) reads: ""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."

In order to support a cause of action pursuant to Labor Law 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident (*see Biafora v City of New York*, 27 AD3d 506 [2d Dept 2006]). Given plaintiff's inability to identify what caused him to fall, defendant establishes, *prima facie*, that the cause of action must be dismissed. In opposition, plaintiff fails to generate an issue of fact as there is an insufficient demonstration that any one or more of the items plaintiff alleges were on the floor of the room was responsible for his fall. As such, plaintiff's factual premise upon which he seeks to ascribe liability for an Industrial Code violation is speculative.

Accordingly, the motion, made pursuant to CPLR 3212, for an order dismissing the complaint and counterclaims as alleged against Restrepo is granted and the complaint is dismissed.

The cross-motion of third-party defendant Rios [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the third-party complaint.

In light of the dismissal of the complaint as set forth above, the motion of Rios for an order dismissing the third-party complaint is granted. The court need not address the indemnification and contribution claims asserted in the third-party counterclaims and cross-claims. Also, there is no justiciable controversy remaining warranting the continuation of this action as against DSM, who was impleaded by Restrepo, but not sued by plaintiff.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is

ORDERED that the motion of defendant RESTREPO CONSTRUCTION LLC. (Restrepo)[Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and counterclaims alleged against it is granted, and the complaint is dismissed; and further

ORDERED that the cross-motion of third-party defendant JOHN F. RIOS d/b/a JOHN RIOS PAINTING Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the third-party complaint is granted, and the third-party complaint is dismissed as against Rios; and it is further

ORDERED that, in light of the forgoing, the third-party action against defaulting third-party defendant DSM HOME IMPROVEMENT, INC. is dismissed as moot, by the court, *sua sponte,* and as such, the third-party complaint is dismissed in its entirety; and it is further

ORDERED that, based on the foregoing, the entire action is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
December 11, 2019

ENTER

HON. LAWRENCE H. ECKER, J.S.C.

Appearances-To: All parties appearing via NYSCEF