SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART 21

RICK O'SHEA,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and HATZEL AND BEUHLER, INC.,

Defendant.

DECISION AND ORDER

Index # 155290/2013

Mot. Seq. 2 and 3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant H&B's Affirmation / Memo of Law	1	46-64
Plaintiff's Affirmation in Opposition / Memo of Law	2	95-98
Plaintiff's Affirmation / Memo of Law	3	65-85
Defendant Authorities Opposition to Plaintiff's Motion	4	99
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LISA A. SOKOLOFF, J.

In this action, Plaintiff Rick O'Shea seeks recovery for his injuries, allegedly caused by the negligence of Defendants Metropolitan Transportation Authority (MTA), New York City Transit Authority (collectively with MTA, "Authorities") and Defendant Hatzel and Beuhler, Inc. ("H&B").

In motion sequence 2, Defendant H&B moves for summary judgment pursuant to CPLR § 3212 and to dismiss the complaint and all cross-claims. In motion sequence 3, Plaintiff moves for summary judgment against Defendant H&B for its violation of Labor Law § 200 and common law negligence, and against Defendants Authorities pursuant to Labor Law §§ 240(1) and 241(6) based on violations of Industrial Code §§ 23-1.7(b)(1) and 23-1.30. Plaintiff has withdrawn its claims of violation of Labor Law § 240(1) and 241(6) against Defendant H&B.

Plaintiff alleges that on December 3, 2012, at approximately 10:30 a.m., while employed by Judlau Contracting, Inc. ("Judlau") on the Second Avenue subway line at 63rd Street and Second Avenue, as he attempted to walk from his work place to the break area, he stepped on a piece of plywood that was improperly secured, which split in half causing him to fall onto metal decking four feet below. The accident area was alleged to have been poorly illuminated.

In motion sequence 2, Defendant H&B moves for summary judgment and dismissal of all claims against it on two grounds. First, it claims that Plaintiff failed to state a cause of action pursuant to Labor Law § 200 because H&B was neither an owner of the premises nor the general contractor at the site and had no authority to direct, supervise or control Plaintiff's work. Second, Plaintiff failed to establish any negligence on the part of H&B that proximately caused the accident.

Plaintiff opposes this motion and contends that Defendant H&B was responsible for the temporary lighting condition in the area where the accident occurred, and the insufficient lighting created a condition that caused Plaintiff's injury.

"The drastic remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990; *DeWanger v St. Vincent's Hosp. & Medical Center of New York*, 118 AD2d 412 [1st Dept 1986]). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326 [1986]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Sherman v. New York State Thruway* Authority, 27

NY3d 1019 [2016]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). All of the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]). The motion should be granted only if there is no rational process by which the jury could find for the plaintiff as against the moving defendant (*Harding v Noble Taxi Corp.*, 182 AD2d 365 [1st Dept 1992]).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Wald v Graev*, 137 AD3d 573 [1st Dept 2016]). Nevertheless, it is axiomatic that factual allegations that consist of bare legal conclusions are not entitled to the general presumption that the facts pleaded are presumed to be true (*Mamoon v Dot Net Inc.*, 135 AD3d 656 [1st Dept 2016]).

According to Plaintiff's 50-H hearing, Plaintiff, a Judlau employee, worked as an ironworker foreman erecting steel and demolishing existing steel to accommodate the Second Avenue subway. Each morning, Plaintiff reported to his Judlau supervisor, Paul McLure, with whom he shared an office, at the job site on the sixth-floor level, directly below street level. Plaintiff's work was performed on the upper invert on the third floor, three floors below the office. To get from the sixth floor to the third floor, he would use a temporary steel staircase and then traverse a designated wooden walkway 35 feet, before turning left onto one of three passageways to walk an additional five feet to reach his work

area. Each passageway was a wooden walkway, approximately 4½ feet long by 2½ feet wide. At the time of the accident, Plaintiff was heading from his work area to a coffee break area and believed he used the middle passageway when the walkway snapped beneath him.

A co-worker, James Petruzziello, came to Plaintiff's aid and picked up the broken plywood that had been covering the walkway. Plaintiff described it as a half-inch thick piece of scrap wood and there were no holes or nails to indicate that it had been secured to the walkway. There were no clear markings with safety paint on the wood, but Plaintiff noticed writing in a thin black Sharpie marker that said, "Do Not Step." Plaintiff testified that he could see no lights in front of the accident location and the closest light behind him was approximately 40 feet away.

Labor Law § 200 was enacted to codify the common law duty of owners and general contractors to provide construction site workers with a safe place to work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order for an individual to recover pursuant to this section, Plaintiff must show that the owner or contractor directed, controlled, or supervised Plaintiff's work, or created or had actual or constructive notice of the condition (*Cappabianca* at 144).

H&B was responsible exclusively for erecting, maintaining, and repairing temporary lighting as required by the MTA standard pursuant to its contract with Judlau. The walkway had been constructed by carpenters and there is no claim that H&B was in any way responsible for the placement of the plywood walkway that gave way under Plaintiff's weight. It is clear from the record that H&B, the electrical subcontractor, was not an owner or a general contractor of the workplace and did not have the authority to direct, supervise or control the means and methods of Plaintiff's work.

Liability can also arise when the accident is caused by a dangerous condition that was either created by the owner or general contractor or about which they had prior notice (*Cappabianca* at 144; *Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]). Plaintiff asserts that he had previously made complaints to numerous people about the lighting in the accident area, including "Jimmy," a reference to James Galante, the H&B representative at the job site. Plaintiff's co-worker, James Petruzziello, who was walking behind Plaintiff and saw him fall through the hole in the walkway, also testified that it was dark in the area of the accident and that he had complained about the lighting to the Judlau site safety manager. The accident area was also described as being "dark" and "not well lit" in the MTA Injury Report Form.

H&B argues that even if it was aware of these complaints, the lighting conditions were in compliance with the MTA standard pursuant to its contract with Judlau. That standard is that lighting must meet five foot-candles in all areas where persons worked or passed, at all times other than emergencies. Jason Shubert, an H&B project manager responsible for maintaining the temporary lighting at the subway construction site since August of 2014, testified that the contract terms and conditions regarding the lighting had not changed since the date of Plaintiff's accident. Plaintiff has not demonstrated that the temporary lighting was not in compliance with either MTA standards or the H&B contract.

To establish a *prima facie* case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept 2013]). Plaintiff claims that H&B was negligent by providing insufficient lighting in the designated walkway which proximately caused Plaintiff's injuries. Were the area properly illuminated, Plaintiff argues, he would have

observed the thin piece of plywood board and the marking "Do Not Step" and would have chosen another route to the breakroom.

Issues of proximate cause are typically fact questions to be decided by a jury and are only appropriately decided on summary judgment where only one conclusion may be drawn from the established facts (*Geralds v Damiano*, 128 AD3d 550 [1st Dept 2015]) and where the question of legal cause may be decided as a matter of law (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144 [1st Dept 2017] [questions of fact as to whether the alleged inadequate lighting on the subject stairway was a proximate cause of the decedent's fall.])

Where the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury (*Rivera v City of New York*, 11 N.Y.2d 856 [1962), and the law draws a distinction between a condition that merely sets the occasion for and facilitated an accident and an act that is a proximate cause of the accident (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [2005], *lv denied* 6 NY3d 708 [2006]). Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by the plaintiff (*Sheehan v City of New York*, 40 NY2d 496 [1976]). A case in which there is very little factual controversy is "singularly appropriate for the exercise of the trial court's screening function" (*Id.* at 502 [1976])

Multiple circumstances may simultaneously serve as proximate causes of an injury, as long as each was a substantial factor in bringing about the injury, even if its contribution to causing the injury was relatively small, as long as it is not slight or trivial (see 1A PJI 2:70, 2:71; *Bell v Angah*, 146 AD3d 734 [1st Dept 2017]).

Here, it cannot be said that insufficient lighting was a substantial factor in causing the accident. Even if H&B's negligence could be shown, its negligence was not a proximate cause of Plaintiff's injury. When asked how the accident happened, Plaintiff responded that he was walking, heard a loud snap, and "the next thing you know, I was looking up... The plywood snapped that they had as a walkway."

Plaintiff further acknowledged that he was not looking down at the piece of wood: "[I]t was a walkway and I was walking through." Plaintiff did not know if the "Do Not Step" marking was facing upward before he stepped on it, so even if he had looked down, and the lighting had been sufficient, there is no evidence from which to infer that he would have seen it.

Thus, H&B has demonstrated its entitlement to judgment as a matter of law by showing that the proximate cause of Plaintiff's accident was the unsecured, piece of scrap wood that was used as a walkway and not the lighting for which H&B was responsible (*D'Avilar v Folks Elec. Inc.*, 67 AD3d 472 [1st Dept 2009] [defendant entitled to judgment as a matter of law by showing that the proximate cause of workplace accident was the failure to turn off the power to the elevator before plaintiff commenced to clean the wheel, sprocket and chain and that it was not responsible to terminate the elevator's power when plaintiff's employer was servicing the elevator]).

To suggest that had the lighting been improved, perhaps Plaintiff would have seen the "Do Not Step" marking is speculative at best and may not be substituted for evidence (*Kenny v Turner Const. Co.*, 107 AD3d 412 [1st Dept 2013] [where plaintiff slipped on black ice in courthouse parking garage, claim that defendant's contribution to the foundation design proximately caused plaintiff's injuries was speculative]; *Igbodudu-Edwards v Board of Managers of Parkchester North Condominium, Inc.*, 105 AD3d 448

[1st Dept 2013] [even assuming there was violation of building code requiring two handrails , given that plaintiff was holding the right-side handrail at the time she fell, would require pure speculation to assume that had there been an intermediate handrail, she would have been able to grasp it as she fell, avoiding injury]. "Speculation, guess and surmise … may not substituted for competent evidence" (*Spano v Onondaga County*, 135 AD2d 1091 [4th Dept 1987]). Finally, allegations of negligence, even if provable, are insufficient to establish liability absent proof that the negligence was a proximate cause of the injury (*Lebron v New York City Housing Authority*, 158 AD3d 503 [1st Dept 2018]).

H&B established *prima facie* entitlement to dismissal of the claims against them under Labor Law § 200 and common-law negligence by demonstrating that the unsecured, half-inch plywood was the sole proximate cause of the accident. In opposition, Plaintiff has failed to raise a triable issue of fact. Accordingly, Plaintiff's claims against H&B under common-law negligence and Labor Law § 200 must be dismissed.

In motion sequence 3, Plaintiff moves for summary against Defendant Authorities seeking recovery pursuant to Labor Law §§ 240(1) and 241(6), for violations of Industrial Code §§ 23-1.7(b)(1) and 23-1.30, and against H&B under common law negligence. Plaintiff contends that as a construction worker engaged in construction who fell through an opening that was covered with an unsecured piece of plywood, he is within the category of persons that §§240(1) and 241(6) were intended to protect.

In opposition, Defendant Authorities contend that there are questions of fact whether Plaintiff's actions were the proximate cause of the accident.

Labor Law § 240(1) requires owners and contractors to provide proper protection to those working on a construction site (*Rocovich v Consolidated Edison Co.*, 78 NY2d

509 [1991] and imposes absolute liability where the failure to provide such protection is a proximate cause of a worker's injury (*Santos v Condo*, 124 LLC, 161 AD3d 650 [1st Dept 2018]) citing *Wilinski v 334 E 92nd Hous. Devl. Fund Corp.*, 18 NY3d 1, 7 [2011]). The failure to provide a protective device establishes an owner or contractor's liability as a matter of law (*Zimmer v Chemung County Performing Arts, Inc*, 65 NY2d 513 [1985]).

When alternative safety devices are available and a plaintiff chooses to utilize a different method, a question of fact exists whether a defendant violated Labor Law § 240(1) (*Robinson v East Med. Ctr.*, LP, 6 NY3d 550 [2006] [plaintiff's own negligent actions in using a six-foot ladder that he knew was too short for the work where eight-foot ladders were available at the work site, were, as a matter of law, the sole proximate cause of his injuries and not entitled to protection of § 240(1)]. Defendant Authorities contend there is a question of fact whether Plaintiff's own conduct was the proximate cause of the accident by choosing a path which included a sign "Do Not Step" rather than the two other routes and failing to use a flashlight or the flash on his phone.

Insofar as Plaintiff testified that he did not look down as he walked along the walkway, and did not know if the "Do Not Step" warning, written in thin black marker, was facing upward before he stepped on the piece of wood, there is no evidence that he made a conscious choice to take a path that put him in danger instead of availing himself of a safer alternative. Moreover, liability under 240(1) is contingent on a statutory violation and proximate cause and once these elements are established, contributory negligence cannot defeat the plaintiff's claim (*Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; *Quattrocchi v F.J. Sciame Const. Corp.*, 44 AD3d 377 [1st Dept 2007]).

The Appellate Division, First Department has repeatedly held that § 240(1) is violated when workers fall through unprotected floor openings (*Carpio v Tishman Const. Corp. of New York,* 240 AD2d 234 [1st Dept 1997] [while looking up at the ceiling using a roller, painter's foot backed into a hole in the floor, causing his leg to fall three feet below the surface to his groin area]; *Burke v Hilton Resorts Corp.*, 85 AD3d 419 [1st Dept 2011] [plaintiff fell 15 feet through an unprotected hole in floor of construction site]; *Alonzo v Safe Harbors of the Hudson Housing Development Fund Co.*, 104 AD3d 446 [1st Dept 2013] [plaintiff stepped on an 8-by-4-foot section of 3/4–inch–thick plywood which unexpectedly "flipped up"]; *Sanchez v 404 Park Partners, LP*, 168 AD3d 491 [1st Dept 2019] [plaintiff fell through opening in floor of building undergoing construction and landed on floor below]). Here, the record is clear that the piece of plywood that failed to hold Plaintiff's weight did not comply with OSHA standards in that it was only one-half inch thick and not secured in any manner. By failing to provide proper protection from the floor opening, the Authorities, as the admitted owners of the premises, are liable under Labor Law § 240(1) as a matter of law.

In order to trigger liability under Labor Law § 241(6), a plaintiff must allege a violation a provision of the Industrial Code that mandates compliance with concrete specifications. Regulations dealing with general safety standards are not a sufficient predicate for liability (*Ross v Curtis-Palmer Hydro-Elect. Co.*, 81 NY2d 494 [1993]; *Kosovrasti v Epic (217) LLC*, 96 AD3d 695 [1st Dept 2012]).

In support of the § 241(6) claim, Plaintiff relies on Industrial Code §§ 23-1.7(b)(i) and 23-1.30. Industrial Code 12 NYCRR 23–1.7(b)(1)(i) provides in pertinent part:

> (b) Falling hazards.
>
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

§ 23–1.30 of the Industrial Code 12 NYCRR 23–1.30. Illumination

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

These provisions impose sufficiently specific duties on which to base liability for a violation of Labor Law § 241(6) and the evidence here, an unsecured, half-inch thick piece of plywood giving way to the floor below, clearly constitutes a "hazardous opening" within the scope of § 23–1.7(b)(i) (*Keegan v Swissotel New York, Inc.*, 262 AD2d 111 [1st Dept 1999]; *Restrepo v Yonkers Racing Corp., Inc.*, 105 AD3d 540 [1st Dept 2013]; *Uluturk v City of New York*, 298 AD2d 233 [1st Dept 2002]).

Insofar as the lighting condition was not a proximate cause of Plaintiff's accident, and there is no evidence establishing that the "Do Not Step" marking was facing upward or observable, whether there was a violation of § 23–1.30 of the Industrial Code will not be addressed by the court.

Accordingly, it is

ORDERED that the Defendant H&B's motion for summary judgment and to dismiss the complaint and all cross-claims against it is **granted**;

ORDERED that the Plaintiff's motion for summary judgment against Defendant Hatzel and Beuhler, Inc. is **denied**;

ORDERED that the Plaintiff's motion for summary judgment against Defendants Metropolitan Transportation Authority and New York City Transit Authority is **granted** and the balance of the action shall proceed to trial on the issue of damages only;

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119);

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

ORDERED that upon service of a copy of this order with notice of entry, the clerk is directed to place this action on the IAS Trial Part (Part 40) calendar for the next available trial date for a trial on damages.

Any requested relief not expressly addressed has nonetheless been considered and is expressly rejected.

Dated: January 13, 2020
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

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