SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JUSTIN ALKES,

Plaintiff,

-against-

F.J. SCIAME CONSTRUCTION CO., INC.,

Defendant.

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Index No. 159325/17
Motion Sequence 002

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

On July 5, 2017, plaintiff Justin Alkes (Plaintiff) severely injured his arm while working as a plumber at a construction site located at 285 Jay Street, Brooklyn, NY. The completed project is now an academic building operated by the New York College of Technology. After the accident, Plaintiff commenced this personal injury action in which he claims that his injury was caused by defendant F.J. Sciame Construction Co., Inc.'s (Defendant) negligence and violation of the New York State Labor Law. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on his Labor Law 240(1) and Labor Law 241(6) claims (predicated on New York Industrial Codes 23-1.21(b)(4)(ii) and 23-1.7(d)). Defendant opposes Plaintiff's motion and cross-moves for an order dismissing the complaint in its entirety. The motion and cross-motion are decided as set forth below.

BACKGROUND

Plaintiff testified and averred[1] that he worked at the construction site as a union journeyman plumber. At the time he was employed by non-party WDF, Inc., the plumbing sub-contractor hired by Sciame, the project's general contractor and construction manager. On the

[1] NYSCEF Doc. No 43 (Alkes Dep.) and NYSCEF Doc. No. 37 (Alkes Aff.).

date of his accident Plaintiff was installing compressors for water fountains above the drop-ceiling in the fifth-floor bathroom. He was working with an apprentice plumber, Mr. Terrell White. Because the bathroom floor in which Plaintiff was setting up his ladder had recently been tiled, Sciame laborers placed sheets of an orange plastic matting material over them for protection.

Following the daily "Toolbox Talk", Plaintiff brought a plastic six-foot A-frame ladder stenciled with the letters "WDF" from the ladder storage area to the bathroom. Plaintiff acknowledged that the task could have been accomplished using the WDF baker's scaffolds that were available to him. However, he did not use the scaffolds "because they're a pain to take apart and bring upstairs. Then you have to take it apart and put it in the room and then put it back together again." Alkes Dep., p. 64. There were other 6-foot A-frame ladders available for Plaintiff to use that day, but he chose this one because it was the same ladder that he had used the previous week (*id.* pp. 30, 45-6, 63, 65, 67).

Plaintiff testified that, upon entering the bathroom, he observed "[a] tiled bathroom with an orange mat on the floor. There really wasn't any type of debris on the floor, just the mat. It looked like they just finished it the prior working day because there was really no footprints on the orange mat." Alkes Dep., p. 58. He set up the ladder near the bathroom sink support and checked the ladder before ascending, as was his custom. He locked the spreader bars and observed that the ladder appeared to be "a little shaky," but seemed appropriate for the task "just to pop the ceiling tile." *Id.* p. 66. Then, as he began to ascend the ladder, it shook and slid, causing both him and the ladder to fall. Plaintiff was injured when his arm struck a wall-mounted steel carrier (*id.* p. 58). He alleges that the fall caused, among other things, a complete rupture of his distal bicep tendon requiring two surgeries to repair.

Following the accident, "[Plaintiff] observed that the tile flooring (that was hidden below the orange mat) was very wet, and also noticed that the underside of the orange mat was wet, as well." *Id.* pp. 95, 101; Alkes Aff., p. 7. He also noticed that the orange matting was taped down with blue painter's tape and other sections of the orange matting were held down by gray duct tape. (Alkes Dep., p. 86, 95, 99; Alkes Aff., p. 7, 9-10). When asked if a photograph of the bathroom from immediately after the accident was an accurate depiction, Plaintiff stated: "… I don't know how much longer it was after I fell that [Mr. White] took the picture because I wasn't there. Apparently[,] the floor dried in that time, and just footprints from myself and, I guess, Terrell [*sic.*] walking around that floor." Alkes Dep., pp. 83-4, 96-7.

Plaintiff's apprentice journeyman plumber, Mr. White, was deposed on April 29, 2019.[2] Mr. White testified that on the day of the accident he started by gathering tools and placing them into a cart. The work that day was to be a continuation of a previous task, namely the installation of compressors for drinking water fountains. Mr. White stated that WDF used ladders marked "WDF" and that they were not permitted to use ladders belonging to the other trades and subcontractors.

After gathering his tools, Mr. White proceeded to the work area with the cart. He testified, "Once I got to the fifth floor, I pushed the shopping cart out the elevator and then that's when I heard, you know, something sounding like a ladder falling and Justin screaming in pain." White Dep., p. 46. "[Plaintiff] was holding his arm and I seen the ladder tipped over, and then there was like water on the floor and there was like this orange mat that was flipped up. It looked like it was held down by tape." *Id.* pp. 47-8. Mr. White observed workers cleaning the tiles with water a few days before the accident. *Id.* p. 59.

[2] NYSCEF Doc. No. 45 (White Dep.).

Immediately following the accident, Mr. White tried calling his WDF foreman, Freddie Emilio, but was unable to reach him by phone. Mr. White located Mr. Emilio in his office in the basement. They went to the site of the accident and, upon seeing that the ladder was not there, Mr. Emilio asked him to retrieve the ladder. "I went one floor down and there was the ladder.... I knew it was that ladder because on the job at that time, we only had [*sic*] six-foot ladder and it said WDF on it." *Id.* p. 81.

Mr. Emilio was deposed on April 29, 2019.[3] He testified that the 6-foot A-frame ladder was the appropriate ladder for the task that Mr. Alkes was undertaking on the day of the accident. Emilio Dep., p. 44.[4] When Mr. Emilio first arrived at the bathroom where the accident occurred, he saw a ladder on the floor - "[i]t was laying on its side, the spreaders were out." *Id.* p. 63. Mr. Emilio described the room, "I saw the floor was wet. There was an orange protective I guess it was plastic that was bunched up.... Well, it was supposed to be taped to the floor. I am not sure if it was duct tape or a blue masking tape, but it was just pushed over, like it was just pushed over." Emilio Dep., pp. 57, 67. In describing the condition of the orange mat, Mr. Emilio noted "The underside was wet. The top wasn't wet. You couldn't tell there was water under [*sic*] the floor." *Id.* p. 131. Mr. Emilio stated that Sciame laborers installed the orange protective floor covering, although he could not say if he saw them installing it in this particular bathroom. *Id.*, p. 110.

After going to the bathroom where the accident took place, Mr. Emilio left to tell two other WDF workers about the accident. *Id.*, p. 71. He returned to the accident site about half hour later only to discover that the ladder was no longer there. *Id.* pp. 62-3, 115. He instructed Mr.

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[3] NYSCEF Doc. No 46 (Emilio Dep.).

[4] Mr. Emilio stated, "[i]f a ladder was bad, I would personally cut it up.... Put it in the trash, never used again." Emilio Dep., p. 20.

White to locate the ladder. Mr. White found the ladder some rooms away and returned it to the bathroom where the accident occurred. *Id.* pp. 61, 74.

At a deposition on May 1, 2019, Michael Porcelli, Sciame's Executive Vice President, testified[5] that Sciame employees were responsible for walking around the site each day to ensure that people were complying with safety rules. Porcelli Dep., pp. 54, 67-9. Mr. Porcelli stated that, in addition to looking for unsafe conditions, Mr. Primiani monitored the job's progression and the work of the various trades. Sciame's tasks involved coordinating, choreographing and scheduling the various subcontractors. *Id.* pp 70-72.

Anthony Primiani, Defendant's Senior Field Superintendent for the construction project, testified[6] that Sciame's employees on the jobsite included "all hour [*sic.*] supers…project managers, assistant project managers, and laborers" (Primiani Dep., p. 79). Mr. Primiani acknowledged that the job of the laborers "would include putting down protective floor covering over an area that had been tiled." *Id.* pp. 79-80. When the tiling subcontractor neared the completion of its tile work in an area,[7] its employees notified Sciame that the floors were ready to be covered. *Id.* p. 76. The timing of this process would "be based on depending when the grout was completed, so if the grout was done late in the day before I would probably wait to the following day. If it was done early in the morning, then the next morning." *Id.* p. 79. The process of grouting the tiles required the use of water and a sponge or squeegee to remove the excess grout. *Id.* pp. 74-5. Because there were issues with moisture being trapped under the grouting material some time was needed after the work was done to let moisture escape. *Id.* p. 232. Mr.

[5] NYSCEF Doc. No. 36 (Porcelli Dep.).

[6] NYSCEF Doc. No. 44 (Primiani Dep.).

[7] The Sciame Daily Work Reports indicate that the last time that the tiling subcontractor worked in the bathroom prior to the accident was May 23 (NYSCEF Doc. No. 103).

Primiani testified that he was the one who purchased the orange protective material in consultation with other contractors. *Id.* pp. 97, 156. Defendant's laborers used both duct tape and blue tape "to hold the edges of the overlapping orange plastic floor covering together" and "to hold down the outer edges of the floor covering to the actual floor itself." *Id.* p 76.

Defendant's safety-related responsibilities for the construction project are defined in the CUNY New Academic Building Agreement.[8] Among other things, Defendant agreed to monitor the issuance of safety permits, facilitate weekly safety meetings, gather facts related to all accidents, "monitor the conditions at the site for conformance with the Site Safety Plan," and notify ownership entities about accidents (Contract p. 131). By contrast, subcontractors like WDF were to "[e]nsure that all employees are aware of the hazards associated with the project through formal and informal training and/or other communications" and "[r]eport unsafe conditions or hazards to the Construction Manager as soon as possible." *Id.* pp. 131-32.

Defendant delegated daily site safety to City Safety Compliance Corporation (City Safety).[9] Gregory Nowak was the City Safety site safety manager at the job site on the morning of the accident and completed an Incident Report shortly thereafter (Nowak Dep, pp. 90-1).[10] Mr. Nowak testified that if he observed an unsafe condition it was his job to either stop the work or notify Defendant. *Id.* p. 45.

Plaintiff retained Irving U. Ojalvo, a Licensed Professional Engineer, as an expert in this case. Mr. Ojalvo conducted an on-site inspection of the bathroom where the accident occurred and "established a coefficient of friction that was comparable to setting the ladder involved in the

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[8] NYSCEF Doc. No. 51, City University of New York, New York City College of Technology New Academic Building Construction Management/Build Services Agreement (Contract).

[9] NYSCEF Doc. No. 48 (Nowak Dep).

[10] NYSCEF Doc. No. 106 (Accident / Incident Report).

incident down on a slippery icy floor."[11] Ojalvo Report, p. 5. He concludes (*id.* at 6-7) (emphasis in original):

> ....that the protective cover for the ceramic flooring upon which Mr. Alkes set his ladder was extremely slippery when wet (and that there is repeated testimony evidence that this was the condition at the time that led to his accident). This wet floor condition, when combined with a shaky ladder, produced a hazardous and unsafe environment that resulted in Mr. Alkes' accident.
>
> A wet floor condition in and of itself was hazardous, unsafe and resulted in the subject incident....
>
> It is also my opinion that Mr. Alkes, a plumber with over 20 years of experience, was not responsible in causing this accident. I state this because he had no way of knowing how slippery the hidden interface between the ceramic floor and plastic floor covering was at the time, nor that his simple act of moving ceiling tiles would result in his ladder sliding without warning, along with the mat beneath it, causing him to fall off the ladder.

Defendant retained its own expert in this case, certified Construction Health and Safety Technician Martin R. Bruno who opined (Bruno Aff. at pp. 8-9):[12]

> ....that Mr. Alkes should have removed the "shaky" ladder from service and not attempted to use it on July 5, 2017. Mr. Alkes conceded that it was his "responsibility to advise his supervisor if there is unsafe equipment on the jobsite." (Alkes EBT 196:14-18). Despite recognizing that the ladder was shaky, Mr. Alkes proceeded to use the ladder to access height. His training, including his OSHA 10 training, his union apprenticeship training, his scaffold training, his site specific orientation, and his general experience as a journeyman plumber should have informed a decision to obtain one of the multiple additional ladders or baker's scaffolds made readily available to him by his employer, WDF. Mr. Alkes' decision to use the ladder, despite recognizing that it was "shaky," was a significant contributing factor to the incident described and alleged. If Mr. Alkes simply obtained a sturdy ladder or baker's scaffold, I am of the opinion that the incident leading to his personal injuries would not have happened. This accident was avoidable if Mr. Alkes simply adhered to his training and his responsibilities on the Construction Site.
>
> Similarly, Mr. Alkes' decision to set the ladder up in the manner described was inappropriate, unsafe and unnecessary.... Plaintiff, who admittedly observed the orange floor covering and observed that it was secured to the wall with tape, decided to set the ladder with the feet of the ladder.

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[11] NYSCEF Doc. No. 49 (Ojalvo Report).

[12] NYSCEF Doc. No. 112, Martin R. Bruno, Defendant Expert Affidavit (Bruno Aff.).

In addition to the question of the ladder's use, Mr. Bruno found additional issues with Plaintiff's actions that day, opining that (*id.* at 9):

> Mr. Alkes' decision to set the ladder up in the manner described was inappropriate, unsafe and unnecessary. Mr. Alkes described needing access to a ceiling tile located in or near the corner of the Subject Bathroom. (Alkes EBT 68:6-11. Plaintiff, who admittedly observed the orange floor covering and observed that it was secured to the wall with tape, decided to set the ladder with the feet of the ladder mere inches from the wall of the bathroom, necessarily near or on top of the adhesive bond between the tape and the wall, which was holding the protective floor covering in place. (Alkes EBT 69:21-70:4). Mr. Alkes testified that while the ladder was not touching the wall, he left himself only "enough room so I can climb over that first rung and ascend the ladder." (Alkes EBT 70:3-4). Based on Plaintiff's observations, training and experience, it should have been abundantly clear that Plaintiff was engaged in risky behavior which could have caused the protective floor covering to become disconnected from the wall. Regardless of the type of tape used (including duct tape), Plaintiff's decision to place this admittedly "shaky" ladder so close to the adhesive bond holding the protective cover in place was unsafe and not necessary. Similarly, regardless of whether or not there was water present between the tile floor and the orange protective covering, Plaintiff's own decision to set up the ladder in this manner was likely to compromise any adhesive bond, which would lead to a potentially unsafe tripping or slipping hazard. I am of the opinion that Plaintiff's training and experience should have informed him of the risks he was taking by setting up the ladder in this manner.

In reply to Mr. Bruno's contentions, Mr. Ojalvo opined (Ojalvo Reply Aff., at p. 5):

> Upon my review of the record, and the various deposition transcripts, there is absolutely no evidence - none - to suggest that when Mr. Alkes placed his ladder, and began to ascend it, that the particular manner in which he stepped was what caused the orange flooring to become loose and slippery. Mr. Alkes testified that the ladder began to shift, and the floor to slip, when he was several rungs up. There was no testimony to suggest that the tape became separated at the moment the ladder was placed, or at the moment Mr. Alkes first stepped upon it. There is not even any testimony to suggest that the tape detached first (before the flooring began to slide away with the ladder) rather than that the tape became detached as a function of the ladder and flooring sliding away.

Mr. Ojalvo also takes issue with Mr. Bruno's criticism of his coefficient of friction findings. "My data set, including the weight of the objects used, and a table of the forces required to move the object under various conditions (wet dry), are all in my report, available to be seen, and if Mr. Bruno is (as he claims) an expert in this field, he should understand the standard formula and calculations." *Id.* p. 7.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Labor Law 240(1)

Plaintiff argues, among other things, that he is entitled to summary judgment based upon the fact that his accident was elevation-related. Defendant opposes on the ground that Plaintiff was the sole proximate cause of his injures because he knowingly chose an improper safety device for the task and inappropriately positioned the ladder. Defendant also argues that there remain numerous issues of material fact surrounding Plaintiff's actions preceding the accident that preclude summary judgment.

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be

held liable regardless of whether they had exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant 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.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility. . .." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* p. 501. A violation of this duty that proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or agent strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

Proximate cause is demonstrated by showing that a party's act or failure to act was a "substantial cause of the events which produced the injury." *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 166 (1980). A workplace accident can have more than one proximate cause. *Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 AD2d 384, 385 (1st Dept 2003). Thus, owners and contractors may be subject to absolute liability under Labor Law 240(1), regardless of an injured worker's contributory negligence (*see Bland v Manocherian*, 66 NY2d 452 [1985]), unless the plaintiff is the sole proximate cause of his injuries. *See Robinson v East Medical Center, LP*, 6 NY3d 550, 554 (2006). Where a plaintiff's action is the sole proximate cause of his injuries, liability under Labor Law 240(1) does not attach. *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998).

"In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason", the Court of Appeals has "continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. . .. Once the plaintiff makes a prime facie showing the burden then shifts to the defendant, who may defeat plaintiff' motion for summary judgment only if there is a plausible view of the evidence — enough to raise a fact question — that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8 (2003).

Here, Plaintiff has met his *prima facie* burden by showing that a statutory violation occurred in that the ladder he was using collapsed. To the extent Defendant argues that Plaintiff's choice of ladder and positioning was the real cause of his accident, at most this implicates comparative fault, which is not a defense to a Labor Law 240(1) claim. Mr. Emilio testified that the ladder was the appropriate size for Plaintiff's task and he would have destroyed any ladder if he thought it was defective. *Id.* p. 4. The fact that the accident was unwitnessed is also not relevant here, as there is nothing in the record, beyond speculation, that would lead the court to discount Plaintiff's testimony. Rather, the admissible evidence shows that the ladder itself was set up on top of an orange plastic mat that Defendant installed with blue tape and duct tape and the Plaintiff sustained injuries when said ladder slipped and fell over. This is sufficient to award Plaintiff summary judgment on the issue of liability under Labor Law 240(1).[13]

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[13] *See Klein v City of NY*, 89 NY2d 833, 835 (1996) (Plaintiff "established a prima facie case that defendant violated Labor Law §240 (1) by failing to ensure the proper placement of the ladder due to the condition of the floor," even though Plaintiff, "who was the sole witness to the accident, testified that although the room appeared clean to him when he entered, after his fall, he observed a film or 'gunk' on the floor where he had placed the ladder"); *Rom v Eurostruct, Inc.*, 158 AD3d 570, 571 (1st Dept 2018) (upholding the "presumption that Labor Law §240 (1) is violated where, as here, a ladder collapses or malfunctions for no apparent reason").

II. Labor Law 241(6)

Like Labor Law 240(1), Labor Law 241(6) imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers. It provides 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 the persons employed therein or lawfully frequenting such places. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a Labor Law 241(6) claim, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Ramos v Patchogue-Medford Sch. Dist.*, 73 AD3d 1010, 1012 (2010); *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Labor Law 241(6) is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 (1993). To recover under Labor Law §241(6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards. *Id.* at 503-4. In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident. *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 (1st Dept 2012).

Plaintiff here seeks summary judgment on only two of the numerous New York Industrial Code violations alleged in his complaint: 12 NYCRR §§ 23-1.21(b)(4)(ii)[14] and 12 NYCRR 23-1.7(d).[15] Defendant cross moves for summary judgment dismissing all of Plaintiff's Labor Law 241(6) claims, not just those upon which Plaintiff seeks summary judgment.

12 NYCRR 23-1.21(b)(4)(ii) requires ladder footings to be firm (*see Hart v Turner Constr. Co.*, 30 AD3d 213, 214 (1st Dept 2006), and the cases involving violations of this Industrial Code involve ladder footings are either missing or defective. *See Soodin v Fargakis*, 91 AD3d 535 (1st Dept 2012) (NYCRR §23-1.21(b)(4)(ii) applied where the plaintiff was supplied with an "old, weak and shaky ladder that lacked the rubber footings"); *Anderson v City of NY*, 2015 N.Y. Misc. LEXIS 4002 (Sup Ct NY. Co. Jan. 16. 2015) (NYCRR §23-1.21(b)(4)(ii) found applicable where the ladder in question was shaky and lacked rubber feet); *Cortes v Madison Sq. Garden Co.*, 2018 N.Y. Misc. LEXIS 2741 (Sup. Ct. NY Co. Jun 29, 2018) (dispute whether plaintiff fell due to the placement of the ladder without rubber feet or due to plaintiff leaning off the ladder). The only case Plaintiff cites to in support is *Melchor v Singh*, 90 AD3d 866 (2d Dept 2011), but like *Soodin, Anderson, and Cortes*, it was the condition of the ladder itself that was at issue: "Taken together, *the old and worn feet*, the use of blocks, and the concrete surface upon which the ladder was placed, constituted a violation of this Industrial Code provision." *Id.* at 870 (emphasis added). Here, there is nothing that would indicate the ladder Plaintiff used was itself was defective in any way, much less that it was missing or had damaged rubber feet. As such, Plaintiff cannot show that Defendant violated NYCRR § 23-1.21(b)(4)(ii).

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[14] 12 NYCRR §23-1.21(b)(4)(ii) provides that "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

[15] 12 NYCRR §23-1.7(d) provides: "Slipping hazards. 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."

Plaintiff's reliance upon 12 NYCRR 23-1.7(d), which protects workers from "slipping hazards" on a "floor, passageway, . . . or other elevated working surface which is in a slippery condition," is also misplaced. At the time of Plaintiff's accident he was standing on a ladder, not directly upon a floor or passageway. This crucial fact removes this case from the scope of § 23-1.7(d). It is for this reason that Plaintiff cannot invoke *Velasquez v 795 Columbus LLC*, 103 AD3d 541 (1st Dept 2013). In that case, § 23-1.7(d) clearly applied to a worker who was injured when he slipped and fell on mud, rocks and water that had gathered on the concrete floor from a broken water main.

Plaintiff's alleged violations involving air quality (12 NYCRR 12-1.2, 12-1.2(a), 12-1.5, 12-1.5(a), 12-1.21) and window cleaning (12 NYCRR 21-1.7(d) and 21.7) are plainly inapplicable to the facts of this case and are hereby dismissed. Plaintiff's allegations concerning OSHA regulations are also dismissed as such regulations cannot support a Labor Law 241(6) cause of action. *See Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 (1st Dept 1999).

In sum, Plaintiff's Labor Law 241(6) claims are without merit, and as such, Defendant's cross-motion for summary judgment dismissing such claims is granted.

III. Labor Law 200 and Common-Law Negligence

Labor Law 200 codifies the common-law duty imposed upon owners and general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law 200 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.

Labor Law 200 claims are generally predicated upon a two-pronged showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries. *See Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993); *Philbin v A.C. & S., Inc.*, 25 AD3d 374 (1st Dept 2006).

Where a claim under Labor Law 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on a general contractor unless it is shown that it exercised some supervisory control over the work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993). Monitoring and oversight of the timing and quality of the work are not enough to impose liability under Labor Law 200 or the common law. *Paz v City of New York*, 85 AD3d 519 (1st Dept 2011); *Kagan v BFP One Liberty Plaza*, 62 AD3d 531, 532 (1st Dept 2009) *lv denied* 13 NY3d 713 (2009); *Dalanna v City of New York*, 308 AD2d 400 (1st Dept 2003). Additionally, a general duty to ensure compliance with safety regulations and the authority to stop work for safety reasons are insufficient to impose liability. *Dalanna*, 308 AD2d at 400; *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468-9 (1st Dept 1998). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007) (emphasis in original).

There is no evidence to support an assertion that Defendant exercised direct supervision or control over the means and methods of Plaintiff's work. While Mr. Porcelli acknowledged that Defendant was responsible for choreographing the work and general worksite, it is clear that the

subcontractors controlled their own employees. Indeed, Plaintiff testified that he took direction solely from his WDF foreman. (Alkes Dep., pp 40-1 - "I don't take direction from a contractor. As a union employee, an employee for WDF, I only take direction from my foreman."); *see also* White Dep., p. 31; Primiani Dep., p. 162. Additionally, although Sciame hired City Safety, this did not confer control over the means and methods by which the subcontractors performed their individual work assignments.

There is however evidence to support an assertion that Defendant knew or should have known about the water condition. As set forth above, Plaintiff, Mr. White and Mr. Emilio testified that they observed the water after the accident (Alkes Dep., pp. 95-96; White Dep., pp. 47-8; Emilio Dep., p. 67):

Q. Did you look at the floor after this happened?
A. Yes.
Q. What did you observe?
A. That the floor was wet.
Q. Where was it wet?
A. The tile floor was wet and the underside of that matting was wet.

* * * *

Q. When you got to the bathroom, what did you see?
A. He was holding his arm and then I seen the ladder tipped over, and then there was like water on the floor and there was like this orange mat that was flipped up.

* * * *

Q. You testified that you observed the floor was wet?

A. The floor was wet and there was [*sic.*] the protective flooring was bunched up and pushed to the side.

More importantly, Mr. White testified that he observed laborers cleaning the grout the day before the accident (White Dep., pp. 61):

Q. Prior to the morning of Mr. Alkes' accident, had you been in that particular bathroom before?

A. Yes.

Q. When most recently had you been in there?

A. So the day before,[16] I think we went – you know, I said we finished the one down the hall and, you know, we went to that one to make sure we can work in there. Like I said, the tile guys were working. I think they were in there the day before we actually finished that bathroom or got to work in that bathroom. . . .

Q. What were they doing when you saw them?

A. So I think they were like cleaning it, you know, I think to get up all the grout. They like used sponge and water to clean it. I think that's what they were doing.

Defendant points out that, according to Sciame's Daily Logs, the tiling contractor completed its work on the fifth floor on May 24, 2017 and did not return to do any follow-up work prior to Plaintiff's July 5, 2017 accident. To this point, Mr. Primiani testified that the logs did not necessarily reflect any work performed by Sciame's own laborers, including grouting work (Primiani Dep., p. 82). But even were the court to accept that Mr. White was mistaken and that no Sciame worker modified the floor in any way in the month leading up the accident, the court cannot accept – as a matter of law - Defendant's contention that any accumulated water must have evaporated. Moreover, the testimony shows that Sciame was aware of water/moisture issues with the prior floor covering, Masonite. Since this was the first time Sciame was using orange plastic to cover the floor, a reasonable argument can be made that Sciame should have ascertained if moisture accumulation remained an issue. In this regard, Mr. Primiani testified (Primiani Dep, pp. 116-117, 120-121, 230-232):

Q. So in connection with the CUNY City Tech project, is there a reason why you didn't continue to use Masonite as the floor cover tile? . . .

A. Well, one reason is the Masonite builds up the floor, so when it's time to install the doors usually the Masonite hits the door . . . And also if the Masonite gets, you know, wet or something spills or if there's any kind of leak, the water or whatever substance gets on the paper and it can stain the floor and just sometimes there's odors that are associated with it . . . .

[16] Upon further questioning, Mr. White clarified that he meant the last time that he was working and not the previous day, which was the July 4 holiday. White Dep., p. 107.

* * * *

Q. If you put Masonite on a surface that was damp, the bottom textured surface would absorb . . . some of that water?

A. Yeah.

Q. When you purchased this orange diamond-plate plastic covering from Colony Hardware, did Colony Hardware provide you with any kind of literature describing how the product was to be used and what the properties of this product were?

A. No.

Q. When Sciame purchased this orange diamond-plate plastic covering from Colony, did Colony provide any training or instructions to Sciame or its employees to show them how to use this product?

A. No.

* * * *

Q. Was there a problem with moisture impacting on Masonite? . . .

A. On the thinner Masonite, yes.

Q. And part of the problem was that moisture on the thinner Masonite would cause sort of a muddy condition to develop under the Masonite, isn't that correct? . . .

A. No. It would cause the Masonite to disform, to buckle. Similar like when a piece of wood swells up. . . .

Q. How would these moisture conditions occur? . . .

A. Depends upon the situation. It could be the condensation, change in temperature in the room. If it's hot one day and then gets cold. . . .

Q. Is there also the issue when using the type of tile you're describing, as the cement that's holding it in place dries and evaporates, that water condenses underneath the Masonite?

A. Sure. If you put the protection on too soon, that's why you like to wait 24 hours until everything dries and the moisture escapes. . . .

Given all of the testimony, the court finds that there is an issue of fact whether Sciame was on constructive notice of the dangerous water condition that is alleged to have caused Plaintiff's injuries. As such, Plaintiff's Labor Law 200 claims shall proceed to a jury.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment on the issue of liability under Labor Law 240(1) is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of liability under Labor Law 241(6) is denied; and it is further

ORDERED that Defendant's cross-motion for summary judgment is granted with respect Plaintiff's Labor Law 241(6) claims; and it is further

ORDERED that Defendant's cross-motion is otherwise denied;

The Clerk of the Court shall enter judgment and mark his records accordingly.

Counsel for all parties are directed to appear for a virtual conference on July 21, 2020, at 9:00AM.

This constitutes the decision and order of the court.

ENTER:

DATED: July 2, 2020

SHERRY KLEIN HEITLER, J.S.C.