SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **IAS MOTION 52EFM**

Justice

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DANIEL QUINTERO,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 156435/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of injuries allegedly sustained by plaintiff, Daniel Quintero, when he tripped and fell on unevenly stacked steel plates near Fulton Street and Howard Avenue in Brooklyn, New York on March 12, 2018 while performing construction. Plaintiff is an employee of Manetta Enterprises, Inc. (hereinafter "Manetta"), who, at the time, was a subcontractor for Consolidated Edison Company of New York, Inc. (hereinafter "Con Ed"). Defendant Con Ed moves for summary judgment on the grounds that plaintiff's claims fail pursuant to Labor Law Sections 200, 240 and 241(6). Plaintiff opposes the instant motion and cross-moves for summary judgement. The City of New York, as co-defendant, opposes plaintiff's cross motion. For the reasons set forth below Con Ed's motion is granted in part and plaintiff's cross motion is denied.[1]

Summary Judgment

[1] The Court would like to thank Yichao Zhang for her assistance in this matter.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1980]. Once the proponent made this showing, 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. See *Zuckerman v City of New York*, 49 NY2d 557 [1980].

The court's function in determining a motion for summary judgment is issue finding rather than issue determination. *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]. Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]. Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case and is properly a question of fact for the jury to decide. See *Losito v. JP Morgan Chase & Co.*, 899 NY2d 375 [2nd Dept 2010]; *Trincere v County of Suffolk*, 90 NY2d 976, 977 [2nd Dept 1997].

Labor Law § 200

Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts. *Brothers v New York Elec. & Gas Corp.*, 11 NY3d 251 [2008]; *Raja v Big Geyser, Inc.*, 144 AD3d 1123 [2d Dept 2016]. There is an exception to this general rule where the hiring entity exercised supervision or control over the independent contractor. The test for determining whether an owner or general contractor is liable for the negligent act of an independent contract is whether

the owner or general contractor had, in fact, exercised such direction, control or supervisory control. *Ross v Curtis-Palmer Hydroelectric Co.*, 81 NY2d 494 [1983]; *Lombardi v Stout*, 80 NY2d 280 [1992]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290 [1978]. The retention or exercise of inspection privileges or the general power to supervise alone does not constitute control so as to impose liability under Labor Law Section 200. *Pacheco v South Bronx Hospital Health Council, Inc.*, 179 AD2d 550 [1st Dept. 1992]; *DeWitt v Pizzagalli Construction Co.*, 183 AD2d 991 [3d Dept. 1992]; *Leon v J& M Peppe Realty Corp.*, 190 AD2d 400 [1st Dept. 1983]; *Curtiss v 37th Street Associates*, 198 AD2d 62 [1st Dept. 1983].

Con Ed contends that the manner in which the steel plates were stacked was the doing of plaintiff's fellow Manetta employees and cannot be attributed to Con Ed. Con Ed argues that it only retained for itself the right to inspect the work being done by Manetta and it did not supervise the manner or method in which plaintiff or his employer performed their job at the site.

In opposition, plaintiff argues that the inspector from Con Ed, Garfield Lewis, testified that the steel plates could cause tripping and were stacked within the work area. Plaintiff argues that Mr. Lewis was present at the site on the day of the incident and he had the contractual authority to stop any unsafe practices at the site.

The Court agrees with Con Ed that it did not control the means and methods of the work done by Manetta, thus its control is insufficient to impose Labor Law Section 200 liability on Con Ed. It is well established that a general level of supervision is not enough to hold defendant liable for plaintiff's injuries where defendant was responsible for making sure the work was going according to schedule, and where its superintendent regularly inspected the work and has the authority to stop work that he observed to be unsafe. See *Alonzo v Safe Harbors of the*

Hudson House. Dev. Fund Co., 104 AD3d 446, 449 [1st Dept 2013]. Accordingly, summary judgment is granted for defendant on this issue.

Labor Law § 240

Labor Law Section 240 provides protection for workers against the special hazards that arise when the worksite either is itself elevated or is positioned below the level where "materials or load are hoisted or secured." The "special hazards" do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the special hazards are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or in adequately secured. *Ross*, supra.

Con Ed argues that plaintiff's Labor Law Section 240 claim must be dismissed because plaintiff did not fall from a height and nothing fell on him from a height. Con Ed has established its entitlement to judgment as a matter of law with respect to the Labor Law Section 240 claim. Plaintiff does not oppose this portion of Con Ed's motion. Accordingly, plaintiff's Labor Law Section 240 claim is dismissed.

Labor Law § 241(6)

Labor Law Section 241(6) essentially requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. To prove a violation of Labor Law Section 241(6), plaintiff must cite and prove that there was a violation of a "specific requirement or standard of conduct" of the Industrial Code.

Plaintiff cites three subsections of the industrial code to support his Labor Law 241(6) claim, namely 12 NYCRR 23-1.7 (e)(1); 12 NYCRR 23-1.7 (e)(2); and 12 NYCRR 23-2.1 (a)(1).

12 NYCRR 23-1.7 (e)(1) provides that "all passageways shall be kept free from accumulations of dirt and debris and other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

Con Ed argues that plaintiff's claims under this subsection fail for two reasons. First, Con Ed argues that where plaintiff fell was not a passageway but an open area where a stack of steel plates was placed on the roadway within the worksite. Second, the steel plates Plaintiff tripped over were not "an accumulation of debris or other obstructions or other conditions." They were integral to the work plaintiff and his fellow workers was performing. Con Ed argues that where the claimed tripping hazard is not dirt or debris but it is an object used in the work, such as a steel roadway plate needed to cover excavated trenches during the excavation and restoration process, this does not support a 23-1.7 (e)(1) claim. See *Tucker v Tishman Construction of New York*, 36 AD3d 417 [1st Dep. 2007] where plaintiff tripped over a piece of rebar which the court held was an integral part of the work he was doing at the time of the accident. In that case, the court held that liability could not be imposed under 23-1.7 (e)(1).

12 NYCRR 23-1.7 (e)(2) provides that "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 in so far as may be consistent with the work being performed."

Con Ed argues that the steel plates were not a floor or work platform as required by the subsection. Also, Con Ed contends that this section is inapplicable because the stack of steel plates was an integral part of the project that plaintiff was working on.

Industrial Code section 23-2.1 (a)(1) provides that "all building materials shall be stored in a safe and orderly manner. Material shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Con Ed argues that this section is inapplicable because plaintiff's accident occurred in an open area, not in one of the four limited areas established by this section. Additionally, Con Ed argues that the steel plates were stored in a safe and orderly manner and were stable. It argues that the plates did not obstruct a passageway, walkway, stairway or other thoroughfare.

Plaintiff argues that Con Ed violated 12 NYCRR 23-1.7 (e)(1) because Con Ed failed to ensure that plaintiff was provided with a passageway that was free from obstructions or conditions that could cause tripping. The site was one lane of a roadway and was merely 10 feet wide and 40-50 feet long, similar to the dimensions of a hallway or corridor. The steel plates are 6 feet wide by 10 feet long and were stacked irregularly. Plaintiff argues that the steel plates were placed directly in the passageway, without sufficient space for plaintiff to navigate on either side.

Plaintiff argues that the steel plates were haphazardly stacked and they were considered a sharp projection in working areas that can cause tripping. Also, plaintiff argues that the steel plates were used only at the end of the day to cover up the ongoing work, and they were not integral to the work that plaintiff was performing at the time of the incident.

Here, Con Ed primarily contends that plaintiff's Labor Law 241(6) claim fails because none of the three subsections of the industrial code cited by plaintiff, namely 12 NYCRR 23-1.7 (e)(1), 12 NYCRR 23-1.7 (e)(2), and 12 NYCRR 23-2.1 (a)(1), supports his claim. Con Ed argues that where plaintiff fell was not a passageway but an open area where a stack of steel plates was placed on the roadway within the worksite, and the steel plates plaintiff tripped over

were integral to the work plaintiff was performing. Con Ed cites caselaw holding that where the material or object allegedly causing plaintiff's trip was an integral part of the project that plaintiff was working on, this will not support a 23-1.7 (e)(2) claim. See *Tucker v Tishman Construction of New York*, 36 AD3d 417 [1st Dept. 2007], where the court held since rebar steel over which plaintiff tripped was integral part of work being performed, not debris, scattered tools and materials, or shar projection, there was no liability under 12 NYCRR 23-1.7 (e)(2).

However, plaintiff argues that the steel plates were not integral to the work plaintiff was performing at the time of the incident because they were used only at the end of the day to cover up the ongoing work, and weren't even used until at least a day after plaintiff's incident according to the deposition transcript of Con Ed witness Garfield Lewis. Thus, the nature of the steel plates plaintiff tripped in our case is different from that of the rebar steel in the *Tucker* case.

Also, plaintiff establishes that the worksite was one lane of a roadway and was merely 10 feet wide and 40-50 feet long, similar to the dimensions of a hallway or corridor, while the steel plates were 6 feet wide by 10 feet long and were stacked irregularly. This could constitute a dangerous and hazardous condition that leaves insufficient space for plaintiff to navigate on either side of the roadway. In opposition, plaintiff aptly raises a triable question of fact that is suitable for a jury to decide as to whether the subject Industrial Code Sections were violated. However, there is insufficient evidence in the record to hold that plaintiff is entitled to judgment as a matter of law as to the 241(6) claim, as a finder of fact could find compliance with the subject Industrial Code Sections. Accordingly, it is hereby

ORDERED that Consolidated Edison's motion for summary judgment is granted in part, and Labor Law Sections 200 and 240 are dismissed as against that entity,, with the Labor Law claim 241(6) remaining; and it is further

ADJUDGED, that plaintiff's cross motion for summary judgment is denied.

7/10/2020
DATE

LYLE E. FRANK, J.S.C.

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