Waldron v City of New York
2020 NY Slip Op 34055(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 151927/2014
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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THOMAS WALDRON,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, JUDLAU CONTRACTING, INC., SCHIAVONE CONSTRUCTION, LLC, PLAZA CONSTRUCTION CORPORATION and PLAZA/SCHIAVONE, A JOINT VENTURE, and STEALTH ARCHITECTURAL WINDOWS, INC.,

Defendants.

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THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, and JUDLAU CONTRACTING, INC,

Third-Party Plaintiffs,

-against-

EATON ELECTRIC, INC.,

Third Party Defendant.

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Index No. 151927/2014

Mot. Seq. No. 7

The following e-filed documents, listed by NYSCEF document number (Motion 007) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 254, 255, 256, 257, 258, 259, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 288, 289, 290, 291, 293, 294, 295, 296

SOKOLOFF, J.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Thomas Waldron, a union electrical foreman on March 27, 2013 when, while working at a construction site located at 11 John Street in Manhattan (the Premises), he was injured when he tripped over an allegedly uneven concrete seam between the landing of a newly installed flight of

stairs (the Stairway) and the existent concrete of the adjoining hallway, causing him to fall down the Stairway.

In motion sequence number 007, defendant Stealth Architectural Windows, Inc. (Stealth) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to amend the bill of particulars and, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against defendants The City of New York (the City), New York City Transit Authority (NYCTA), The Metropolitan Transportation Authority (MTA), MTA Capital Construction Company (MTACC) (collectively the City Defendants), Judlau Contracting, Inc. (Judlau), Schiavone Construction, LLC (Schiavone), Plaza Construction Corporation (Plaza), and Plaza/Schiavone, A Joint Venture (the JV) (in toto, the defendants).[1]

BACKGROUND

On the day of the accident, the City was the owner of the Premises and the subway system beneath the Premises. The City leased the subway to NYCTA, a subsidiary of the MTA. MTACC is an agency whose primary duty includes managing large construction projects for the MTA. The City hired Judlau as the general contractor for a project at the Premises that included the renovation of the building to provide an egress to the adjacent Fulton Street Transit Center, a subway station (the Project). Judlau, in turn, hired Stealth to install steel pans and framework for the Stairway, amongst other things. Judlau poured and finished the concrete. Third-party defendant Eaton Electric, Inc. (Eaton) was an electrical subcontractor on the Project. Plaintiff was employed by Eaton.

[1] Plaintiff does not move against Stealth.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as an electrical foreman for Eaton. He was "the guy in charge" of the electrical work at the Project (plaintiff's tr at 19). His duties included scheduling and assigning work to the other electricians at the Project, as well as performing electrical work himself.

On the day of the accident, plaintiff worked without incident through lunch. After lunch, plaintiff began walking to the electrical room in the basement of the Premises. To get to the basement, plaintiff traversed a flight of stairs that had been recently installed by other contractors at the Project – the Stairway. It was the first time that Plaintiff used the Stairway since it had been installed.

Plaintiff testified that, immediately before the accident, he was walking down a passageway and made a right turn to proceed down the Stairway. Immediately after the turn, plaintiff testified, "there was a difference in height from the top of the stair landing to the existing floor" which caused his foot to buckle (*id.* at 63). Plaintiff estimated the height difference between the landing and the existing floor as "a couple of inches" (*id.* at 64).

Due to the height differential, plaintiff lost his balance, "stumbled forward . . . [and] went to grab for a handrail" (*id.* at 64). However, "there was nothing present to grab onto" (*id.*). Plaintiff then fell, initially landing three or four steps down the Stairway on his right side before rolling to the landing below.

Plaintiff estimated that the concrete Stairway had been installed one week prior to his accident. Prior to that, the Stairway had been a temporary wooden staircase with temporary wooden handrails. Plaintiff did not know who installed the Stairway or the handrails.

Deposition Testimony of Kenneth Shelly (Plaintiff's Coworker)

Kenneth Shelly testified that on the day of the accident, he was an electrician employed by Eaton. Plaintiff was his foreman. Shelly explained that, at the time of the accident, he had just walked down the Stairway ahead of plaintiff, when he heard plaintiff yell out. Shelly turned around and saw plaintiff rolling down the stairs. He did not see plaintiff trip and did not know what caused him to fall.

Deposition Testimony of Robert Sammons (Judlau's Project Engineer)

Robert Sammons testified that on the day of the accident, he was Judlau's project engineer for the Project. Judlau was a general contractor for the Project at the Premises. Sammons' duties included scheduling and planning work and overseeing Judlau's subcontractors. He confirmed Stealth was responsible for installing "structural support" for the Stairway (Sammons tr at 68). Judlau was responsible for "the remainder of the work with the concrete installation" (*id.*). Specifically, Stealth was responsible for installing the "steel pan stairs" (*id.* at 70), while Judlau was responsible for "fill[ing] those pans with concrete to form the flat surface of the tread of the stair" (*id.*). Judlau was also responsible for installing temporary handrails, though Stealth was ultimately responsible for installing permanent handrails once Judlau completed the Stairway (*id.* at 83-85).

When Sammons was asked whether there was a problem with Stealth's installation of the steel pan stairs, he responded "[n]othing that I can recall" (*id.* at 125). In addition, Sammons testified that he did not recall "any significant visual defect" in the concrete seam between the newly installed Stairway and the adjacent landing (*id.* at 91). Further, Sammons testified that he "remember[ed] the seam to the existing floor was actually pretty smooth and flush and not much of a problem" (*id.* at 93).

Deposition Testimony of Barry Borgen (Stealth's President)

Barry Borgen testified that on the day of the accident, he was the president and owner of Stealth, an architectural metal and glass company. Stealth was hired by Judlau to, among other things, install the structural steel pans for the Stairway (Borgen tr at 36). Borgen explained as follows:

> We installed the pans for the stairs and Judlau either contracts or did it themselves, pour the concrete, then afterwards [Judlau] do[es] some type of finishing of the walls and then we come back and install the permanent handrails

(*id.* at 45-46). Borgen did not know how much time elapsed between Stealth's installation of the steel pan and the permanent handrails. Further, Borgen testified that, pursuant to its contract with Judlau, Stealth was not responsible for installing temporary handrails.

Borgen was shown an email from a Judlau representative, dated April 4, 2013[subsequent to the March 27, 2013accident]. He confirmed that it directed Stealth to install the Stairway's permanent handrails "by 4/12" (*id.* at 72). Prior to this email, Stealth had not received a directive to install the handrails.

The April 4, 2013 Email

By email dated April 8, 2013, Ankit Gajjar, Judlau's project engineer, notified Stealth of several outstanding issues. Four of the issues were marked in red and denoted as "late" (NYSCEF Doc No 239). None of these issues are pertinent to this action. The seventh item listed in the email – which was not marked in red – was "Handrail at subbasement – installed by 04/12" of 2013 (*id.*).

DISCUSSION

> [T]he 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 demonstrate the absence of any

> material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Cross Motion for Leave to Amend

As part of his cross motion, plaintiff seeks – pre-note of issue – leave to amend his bill of particulars to include two Industrial Code sections, specifically 12 NYCRR 23-1.7 (e) (1), which governs tripping hazards in a passageway, and 12 NYCRR 23-1.7 (f), which governs safety in vertical passageways.

Pursuant to CPLR 3025 (b), a request for leave to amend "should be 'freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law'" (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2016], quoting McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*O'Halloran v. Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017] [internal quotation marks and citations omitted]). "Prejudice does not occur simply because a defendant . . . has to expend additional time

preparing its case. Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Jacobson v McNeil Consumer & Specialty Pharm.*, 68 AD3d 652, 654-655 [1st Dept 2009]).

Here, because this action is pre-note of issue, defendants cannot claim surprise or prejudice from the inclusion of the subject industrial code provisions, considering that discovery is not complete and additional discovery on these matters (including further depositions, if necessary) may be obtained.

Further, as will be discussed fully below, the subject Industrial Code provisions are not palpably improper or insufficient as a matter of law, as they are reasonably related to plaintiff's accident, as alleged. Accordingly, plaintiff's request for leave to amend is granted.

The Labor Law § 240 (1) Claim

Stealth moves for summary judgment dismissing the Labor Law § 240 (1) claim as against it. Plaintiff cross-moves for summary judgment in his favor on the same claim as against City Defendants and Judlau.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> 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.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v*

Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Stealth

Stealth argues that it is not a proper Labor Law defendant for the purposes of Labor Law §§ 240 (1) and 241 (6) because it was not an owner, general contractor or an agent of either. Notably, plaintiff does not oppose Stealth's motion. Further, at oral argument before this court on November 14, 2019, counsel for plaintiff affirmatively stated: "I don't oppose Stealth being let out of the case" (court tr at 22; NYSCEF Doc. No. 293).

Moreover, the City Defendants and Judlau, in their opposition papers, do not raise any arguments regarding Stealth's dismissal with respect to the Labor Law §§ 240 (1) and 241 (6) claims.[2]

Therefore, given plaintiff's position and defendants lack of argument in opposition to Stealth's request for dismissal of the Labor Law § 240 (1) and 241 (6) claims, Stealth is entitled to summary judgment dismissing said claims as against it.

The City Defendants and Judlau

Plaintiff seeks summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against all defendants, except Stealth. However, in his papers, plaintiff raises arguments only with respect to the City Defendants and Judlau.

As an initial matter the City Defendants and Judlau do not contest that they are proper Labor Law defendants with respect to plaintiff's accident.

Here, plaintiff argues that the Stairway falls within the ambit of section 240 (1) because the Stairway itself was a safety device – i.e., the sole means of access to his work area in the sub-basement – and the City Defendants and Judlau's (1) failure to create an even transition from the hallway to the Stairway, and (2) failure to provide temporary handrails, made the Stairway an insufficient safety device to protect him from a gravity related harm.

Plaintiff is correct that the Stairway, in this instance, was serving as a safety device. A stairway that is the sole means of access to a work area has been held to be a safety device in the context of Labor Law § 240 (1) (*Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 550-551 [1st Dept 2014] [permanent staircase with no guard rails that "provided

[2] The City Defendants and Judlau, however, do raise several arguments regarding Stealth's motion with respect to the Labor Law § 200 and common-law negligence claims. Those arguments will be discussed below.

the sole means of access to the floors of the building" was a safety device within the scope of section 240 (1)]; *Ramirez v Shoats*, 78 AD3d 515, 517 [1st Dept 2010] [noting that a "permanently installed staircase used as a passageway" may be a statutory safety device under section 240 (1) if it is the sole means of access to the work area]; *accord Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018]).

The City Defendants and Judlau argue that plaintiff had two alternative means of access to the basement available to him – (1) an equipment hatch and (2) entering through an adjacent building. Therefore, they argue, the Stairway was not plaintiff's sole means of access to his work area in the basement. That said,

> even if plaintiff had an alternative way to get to and from his work area, the stairs provided the most efficient means of access. It flies in the face of common sense to require a worker to utilize [an equipment hatch] over a seemingly completed staircase . . . . [I]t seems almost ridiculous to preclude recovery merely because plaintiff had an alternative means to descend from his work area, especially when that alternative route may have seemed more dangerous than the stairs plaintiff did utilize.

(*Ramirez*, 78 AD3d at 517). Here, as in *Ramirez*, it does not make sense to expect plaintiff to take a circuitous route through an adjoining building where his employer is not a subcontractor and he would be unable to pass through security. Nor does it make sense to preclude recovery merely because plaintiff could have used an equipment hatch rather than the Stairway, especially considering that the Stairway was not barred or otherwise barricaded against use.

Accordingly, the Stairway was a safety device for the purpose of the Labor Law.

Next, plaintiff must establish that the City Defendants and Judlau failed to provide him with adequate protection against an elevation related risk and that his injuries were the direct consequence of that failure (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). To that end, plaintiff relies upon the alleged existence of the uneven seam between the

Stairway's landing and the adjacent hallway, as well as the lack of a handrail on the Stairway to assist in arresting his fall.

In opposition, the City Defendants and Judlau initially argue that the accident is not the type of accident protected by the Labor Law, because plaintiff tripped and fell. This argument is unpersuasive. That plaintiff's accident was precipitated by tripping over the seam in the concrete, which, in and of itself, "does not take the case out of the ambit of Labor Law § 240 (1)" provided that plaintiff's trip also led to a height related incident (*Conlon,* 159 AD3d at 655).

Next, the City Defendants and Judlau also argue that plaintiff's fall was unwitnessed and, therefore, plaintiff is precluded from seeking summary judgment. This is incorrect. The fact that the accident was unwitnessed is of no consequence (*Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001] [the fact "[t]hat the accident was unwitnessed present[ed] no bar to summary judgment"]).

That said, the court notes that this is a case where the parties offer two distinct versions of the accident. Plaintiff testified that his foot encountered a two-to-three-inch height differential in the seam between the Stairway and the landing that caused him to lose his balance and fall down the unguarded stairs. Alternately, Sammons testified that the seam "was actually pretty smooth and flush," indicating that plaintiff's fall was solely the result of a misstep and, therefore, an unprotected common peril of the workplace rather than a statutorily protected elevation-related matter (Sammons tr at 92).

Accordingly, there are two distinct versions of the accident, one version where plaintiff was caused to trip and fall down the unguarded Stairway due to a height differential of the seam between the Stairway's landing and the adjacent hallway – which would give rise to protections under the Labor Law – and a second version where plaintiff merely misstepped – which would

not (*see e.g. Watson v Hudson Val. Farms,* 276 AD2d 1004, 1005 [3d Dept 2000] [where there is "conflicting evidence as to whether plaintiff 'misstepped' or tripped as a result of a defect" summary judgment is not warranted]).

"Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [1st Dept 2007] [denying summary judgment on section 240 (1) cause of action where two credible theories of the accident existed]). Ultimately, determinations of credibility are properly left for a jury (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]).

In addition, with respect to the handrail, plaintiff has not established that the handrail would have prevented his fall, or whether the lack of the handrail was a proximate cause of the trip that caused his fall. Accordingly, factual issues are presented as to whether the Stairway provided adequate protection to plaintiff (*see e.g. O'Brien*, 29 NY3d at 34).

Thus, because differing versions of the accident raise a question of fact as to whether a violation of Labor Law § 240 (1) proximately caused plaintiff's accident, plaintiff is not entitled to summary judgment in his favor as to the Labor Law § 240 (1) claim against defendants.

The Labor Law § 241 (6) Claim

Stealth moves for summary judgment dismissing the Labor Law § 241 (6) claim as against it. Plaintiff cross moves for summary judgment in his favor on the same claim as against defendants.

As discussed above, given plaintiff's and defendants' lack of opposition to the dismissal of the Labor Law § 241 (6) claim as against Stealth, summary judgment is warranted dismissing these claim against Stealth.

Labor Law § 241 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 of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff moves for summary judgment only with respect to alleged violations of the following Industrial Code provisions: 12 NYCRR 23-1.7 (e) (1) and (f).

Industrial Code 12 NYCRR 23-1.7 (e) (1)

Industrial Code 12 NYCRR 23-1.7 (e) (1) provides, in pertinent part, as follows:

> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping . . .

Initially, section 23-1.7 (e) is sufficiently specific to support a Labor Law § 241 (6) claim (*Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]).

Here, plaintiff alleges that he tripped over an uneven seam in the concrete of the landing leading from the hallway to the Stairway. The hallway leading to the Stairway is a passageway as contemplated by section 23-1.7 (e) (1). (*Prevost v One City Block, LLC*, 155 AD3d 531, 535 [1st Dept 2017], quoting *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013] ["While the term 'passageway' is not defined in the Industrial Code, 'courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area"]).

Further, plaintiff alleges that he tripped over a condition in the passageway – i.e. the allegedly two- to three-inch height difference in the seam between the Stairway's landing and the hallway's floor. However, as discussed above, there is a question of fact as to whether the seam was, in fact, uneven, such that plaintiff was caused to trip, or whether he merely misstepped. Accordingly, factual issues exist with respect to what proximately caused the accident.

Thus, plaintiff is not entitled to summary judgment in his favor as against defendants on that part of his Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (1).

Industrial Code 12 NYCRR 23-1.7 (f)

Industrial Code 12 NYCRR 23-1.7 (f) provides, in pertinent part, as follows:

> (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work

> prevents their installation in which case ladders or other safe means of access shall be provided.

Initially, section 23-1.7 (f) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]; *Atkins v Baker,* 247 AD2d 562, 562 [2d Dept 1998]). Further, section 1.7 (f) "imposes a duty upon a defendant to provide a safe staircase, free of defects" (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [1st Dept 2010]).

Here, plaintiff alleged that the Stairway was not safe because it lacked handrails, and because the transition from the hallway to the Stairway's landing was uneven, which caused him to trip.

However, as noted above, questions of fact remain as to the nature and cause of plaintiff's accident, giving rise to whether either of these alleged defects proximately caused his accident. Accordingly, plaintiff is not entitled to summary judgment in his favor as against defendants on that part of his Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (f).

The Common-Law Negligence and Labor Law § 200 Claims

Stealth moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> 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.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner [or contractor] created the dangerous condition causing an injury or when the owner [or contractor] 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], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the accident was caused by an allegedly dangerous condition on the premises – i.e. the uneven seam between the Stairway's landing and the adjoining hallway. The record demonstrates that Stealth was not responsible for installing, shaping, or leveling the concrete of the Stairway or its landing, or the concrete in the adjacent hallway. Rather, Stealth was responsible for installing the Stairway's steel pans and framework. The record also establishes that Stealth performed such steel framework for Judlau and that Judlau accepted and approved such work before Judlau proceeded to pour and level the concrete. Accordingly, the record demonstrates that Stealth did not create the subject condition.

Further, it is undisputed that Stealth did not have actual notice of any defective condition. Even if it had been given such notice, Stealth had no duty to remedy such alleged defect in the concrete as Stealth was not responsible for pouring or leveling the Stairway's concrete. Moreover, there is no evidence in the record that would establish that Stealth should have known of the alleged defective condition such that constructive notice could be applied to Stealth.

Judlau's argument that Stealth installed a defective steel pan is meritless, as Judlau itself was responsible for approving Stealth's work and making sure that Stealth had conformed to all engineering specifications as set forth in the Project's documents. The record does not indicate that Judlau ever raised any concerns as to the sufficiency of the steel pans or any other aspect of Stealth's work. Accordingly, this argument fails to raise a question of fact as to whether Stealth's work created the subject condition.

Finally, to the extent that plaintiff argues that the accident was caused by the lack of a handrail, Stealth did not have a contractual obligation to provide temporary handrails at the Project. Rather, it had the obligation to install permanent handrails once all other work on the Stairway had been completed – i.e. pouring, finishing and leveling the concrete, tiling the walls,

installing ceilings and light fixtures – none of which was Stealth's contractual responsibility. It is uncontested that Judlau was the entity that directed Stealth to install permanent handrails. It is also uncontested that Judlau did not direct Stealth to do so until over a week after the accident (NYSCEF Doc. No. 239).

Accordingly, Stealth is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

The parties remaining arguments have been considered and were found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion by defendant Stealth Architectural Windows, Inc. (Stealth) (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims against it is granted, and the complaint is dismissed as to Stealth with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Stealth shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of 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); and it is further

ORDERED that the branch of the cross motion by plaintiff, pursuant to CPLR 3025 (b), to amend the bill of particulars to add claims of violations of Industrial Code sections 12 NYCRR 23-1.7 (e) (1) and (f) is granted; and it is further

ORDERED that the branch of the cross motion by plaintiff, pursuant to CPLR 3212, for summary judgment, in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against defendants The City of New York, New York City Transit Authority, The Metropolitan Transportation Authority, MTA Capital Construction Company, Judlau Contracting, Inc., Schiavone Construction, LLC, Plaza Construction Corporation, and Plaza/Schiavone, A Joint Venture, is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties are requested to reach out to the Court attorney to Justice Machelle Sweeting at bbuliu@nycourts.gov to schedule a conference in Part 62.

Dated: December 9, 2020

ENTER:

LISA A. SOKOLOFF, A.J.S.C.