SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
OSVALDO LEWIS,

Plaintiff,

-against-

PARK MONROE II LLC,

Defendant.
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Index No.: 501315/2018
Motion Date: 10-26-20
Mot. Seq. No.: 2

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, PARK MONROE II LLC ("Park Monroe") moves for an order pursuant to CPLR §3212 awarding it summary judgment dismissing plaintiff's complaint.

Background:

The plaintiff, OSVALDO LEWIS, commenced this action claiming that he was injured on June 13, 2015, while working as a laborer on the renovation of a four-story residential apartment building located at 1939 Park Place, Brooklyn, New York. The defendant owned the building. At the time of the accident, the plaintiff was employed of Jayeska Corp. , a subcontractor that was hired by MDG Construction & Design, the general contractor, to assist in the renovation. In the complaint, plaintiff alleged causes of action pursuant to Labor Law §§

240(1), 241(6) and 200(1) as well as a cause of action sounding in common law negligence. The defendant now seeks dismissal of all causes of action alleged in the complaint.

The evidentiary materials submitted by Park Monroe in support of the motion include the deposition transcripts of the plaintiff and the defendant, as well as an affidavit of Bernard P. Lorenz, P.E.

Plaintiff's Deposition:

The plaintiff testified that shortly before the accident, he was instructed by his supervisor, whose name he did not recall, to bring a sealed bucket of plaster to an apartment on the fourth floor. He did not recall if he had worked in that apartment prior to the day of the accident but had not worked in apartment that day. Plaintiff entered the apartment through the living room, turned left, and began walking towards the bathroom carrying the bucket of plaster. Plaintiff claims that when he walked into the bathroom, he tripped over a piece of metal framing that was placed on the bathroom floor to frame out the area where a new concrete floor was going to be poured.

When asked to describe the conditions of the bathroom at the time of the accident, he testified as follows:

> Q. What state was the bathroom floor in?
>
> A. The bathroom was completed[sic] destroyed because they were doing renovation.
>
> Q. Were there tile floors down?
>
> A. Nothing was on the floor. It was only the skeleton of the apartment.
>
> Q. Was that a concrete material or something else?
>
> A. Only like sheetrock on top of that. Everything was demolished, **they were going to put a new bathroom and new**

floor. It was going to be a complete renovation. (Plaintiff's Deposition, pp 45-46 [emphasis added]).

Plaintiff's testimony concerning the happening of the accident was as follows:

Q. What did your foot trip on?

A. Here, look. The floor was completely destroyed. There was no cement, there was no platform, there was nothing. There was a level like this from floor to floor. **That's what they were going to use to make the floor a bathroom**. There was a space here between the floor and the frame. So when I went like this, my foot went inside and that's when I fell with the bucket. I hurt both ankles and my left hand (indicating).

Q. My understanding is that the room floor was completely stripped and at a lower level?

A. It was higher. **This is the floor of the bathroom, there is a frame that you put there, then you fill it up with cement**. There was a space that was left over where my foot went inside and that's where the accident happened (indicating).

Q. What was the frame made out of?

A. Metal. You put the frame up, you fill it up with cement, then you put tiles.

Q. So the metal frame was higher than the floor that was in the living room, is that correct?

A. When you have a floor, when the floor comes from the living room -- when you go to the bathroom, this is the floor of the bathroom (indicating). They have a thing here, the frame. Then you have to fill it up with cement and there was a space that was left over that was not filled up.

Q. Had cement been poured at the time of your accident?

A. No. They were in the process of doing a complete renovation.

Q. Was it the frame itself that caused you to fall?

A. Yes. The frame because it was not completely finished. That space, nothing was fixed there.

> Q. Please correct me if I'm wrong. What I understand is that your foot came into contact with the frame and that's what caused you to trip?
>
> A. Correct. That space between the frame and the floor. (Plaintiff's Deposition, pp 52-54 [emphasis added]).

Defendant's Deposition:

The witness produced by the defendant, Yonnie Cho, knew very little about what was going on at the building where the accident occurred around time of the accident. Mr. Cho is employed by Northeast Brooklyn Housing, a nonprofit developer of affordable housing, who is the parent company of Park Monroe, who he identified as the actual owner of 1939 Park Place. Mr. Cho did not give any testimony concerning what type of work was done in the building or in the apartment where the accident occurred prior to the accident.

Bernard P. Lorenz, P.E.'s Affidavit:

In support of the motion, defendant submitted the affidavit from Bernard P. Lorenz, P.E. Mr. Lorenz reviewed various materials, including the depositions of the parties, and opined that the metal framing that plaintiff tripped over was integral to the ongoing renovation work that was taking place at the time of the accident.

Discussion:

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 (*see Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 348, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 501–502, 601 N.Y.S.2d

49, 618 N.E.2d 82; *Brownrigg v. New York City Hous. Auth.*, 119 A.D.3d 504, 990 N.Y.S.2d 34). The statute requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the Industrial Code (*see Misicki v. Caradonna*, 12 N.Y.3d 511, 515, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). To prevail on a cause of action pursuant to § 241(6), a plaintiff must alleged and prove a violation of the Industrial Code and the particular safety rule or regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply set forth general safety standards (*see Misicki v. Caradonna*, 12 N.Y.3d at 515, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d at 504–505, 601 N.Y.S.2d 49, 618 N.E.2d 82).

Here, plaintiff's Labor Law § 241(6) claim is predicated on a violation Industrial Code § 23–1.7(e), which provides as follows:

> 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. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

While plaintiff alleged other violations of the Industrial Code, plaintiff has abandoned any reliance on these sections by failing to address them in his opposition papers (*see Harsch v.*

City of New York, 78 A.D.3d 781, 783, 910 N.Y.S.2d 540, 542; *Cardenas v. One State St., LLC*, 68 A.D.3d 436, 438, 890 N.Y.S.2d 41).

Defendant maintains that plaintiff may not rely on this 12 NYCRR 23–1.7(e) as a predicate to liability since the piece of metal framing that the plaintiff tripped over was an integral part of the construction work that was taking place at the time of the accident. Defendant correctly contends that a party is not entitled to recovery under Labor Law § 241(6) based on a violation of 12 NYCRR 23–1.7(e) where the object he or she tripped over was an integral part of the construction (*see Aragona v. State*, 147 A.D.3d 808, 809, 47 N.Y.S.3d 115, 117–18, *O'Sullivan v. IDI Constr. Co., Inc.*, 7 N.Y.3d 805, 822 N.Y.S.2d 745, 855 N.E.2d 1159). The "integral-to-work" defense does not mean integral to a plaintiff's specific task. "The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident" (*Krzyzanowski v. City of New York*, 179 A.D.3d 479, 481, 118 N.Y.S.3d 10, 12–13, *citing O'Sullivan*, 7 N.Y.3d at 805, 822 N.Y.S.2d 745, 855 N.E.2d 1159).

Here, through the submission of plaintiff's own testimony, the defendant established its prima facie entitlement to summary judgment dismissing the Labor Law § 241(6) claim. Contrary to plaintiff's contention, plaintiff's testimony sufficiently established that piece of metal framing that he tripped over was part of the framing for a new concrete floor in the bathroom that was going to be poured as part of the renovation. The plaintiff failed to raise a triable issue of fact. Accordingly, plaintiff's cause of action pursuant to Labor Law § 241(6) is therefore dismissed.

Since plaintiff did not oppose those branches of defendant's motion seeking summary judgment dismissing plaintiff's common law claims and his claims pursuant to Labor Law

240(1) and 200(1), defendant's motion, to the extent it seeks dismissal of those claims, is granted.

For all of the above reasons, it is hereby

ORDRED that defendant's motion for summary judgment dismissing plaintiff's complaint is **GRANTED.**

This constitutes the decision and order of the Court.

Dated: December 10, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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