Moley v NYU Hosps. Ctr.
2021 NY Slip Op 30018(U)
January 6, 2021
Supreme Court, New York County
Docket Number: 151405/2016
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

---X

INDEX NO. 151405/2016

JEROME MOLEY,

MOTION DATE 05/15/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

NYU HOSPITALS CENTER, TURNER CONSTRUCTION COMPANY

DECISION + ORDER ON MOTION

Defendant.

---X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that the branch of Defendants NYU Hospitals Center and Turner Construction Company's ("Defendants") motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that the Labor Law §§ 200 and 240 (1) claims withdrawn by Plaintiff are dismissed; and it is further

ORDERED that the branch of Defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing Labor Law § 241 (6) claim is granted to the extent that Plaintiff's claims pursuant to Sections 23-1.5(c)(1)-(2) and 23-1.7(b)(1)(i) are dismissed; and it is further

ORDERED that the branch of Plaintiff's cross-motion (Motion Seq. 002), pursuant to CPLR 3212, seeking summary judgment granting his Labor Law § 241 (6) claim is granted to the extent that his claim pursuant to Section 23-1.7(e)(2) is granted.

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

MEMORANDUM DECISION

In this Labor Law action, defendants NYU Hospitals Center ("NYU") and Turner Construction Company ("Turner") move, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Jerome Moley's complaint against them.

Plaintiff partially opposes and simultaneously cross-moves, pursuant to CPLR 3212, for summary judgment on the issue of liability on his Labor Law § 241 (6) claim.

BACKGROUND FACTS

On January 5, 2016, Plaintiff, a journeyman employed by non-party Stonebridge, Inc. ("Stonebridge") was working at the NYU Langone Medical Center Kimmel Pavilion project (the "Project") located at 424 East 34th Street. To complete the Project, NYU entered into a Construction Management Agreement with Turner which then hired Stonebridge to act as the steel erection subcontractor.

Plaintiff testified that on the day of the accident, he was assigned to perform bolting up work at the 11th floor of the Project site (NYSCEF doc No. 63, p. 101:21-25). He started work at 6:30 a.m., but took a coffee break with his co-workers a little after 10:00 a.m. at the 12th floor (*Id.*, pp. 104-106). Plaintiff further testified that when they were on their way back to the 11th floor, he tripped over a "steel [called] mesh that [is] put to cover holes up", "fell down" and "landed on [his] right knee" (*Id.*, 108:24-25 to 109:1-3). Plaintiff claims that the steel mesh he tripped over was protruding up (*Id.*, 129:7-11, 130).

Plaintiff commenced this action against defendants on February 19, 2016, seeking damages under New York Labor Law §§ 200, 240 and 241 (6).

Defendants now move, by way of summary judgment, to dismiss the complaint against them in its entirety. Plaintiff does not oppose the portion of defendants' motion for summary

judgment seeking dismissal of Plaintiff's Labor Law §§ 200 and 240 (1) claims, but cross-moves for summary judgment on the issue of liability pursuant to Labor Law 241 (6).

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.,* 15 NY3d 297, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

Here, since each side seeks summary judgment, each side bears the burden of making a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217[A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the

existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*Id.*). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Timeliness of Plaintiff's Summary Judgment Motion

Defendants argue that Plaintiff's summary judgment motion was filed beyond the deadline. According to Defendants, as Plaintiff failed to offer a "good cause" for his late motion, this Court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion (NYSCEF doc No. 76, ¶¶ 7-9).

Plaintiff does not dispute that his motion is untimely, but he insists that precedents dictate that a party may cross-move for summary judgment after the deadline "as long as the relief sought is identical to the relief which was sought by the initial movant" (NYSCEF doc No. 77, ¶¶ 4-5).

In a "So-Ordered" stipulation dated April 13, 2020, the parties agreed to set the deadline for filing summary judgment motions on May 15, 2020. Plaintiff's cross-motion was only filed on July 3, 2020, well past the deadline. This notwithstanding, the Court will entertain Plaintiff's late

summary judgment motion as it seeks relief on the same issues addressed in Defendants' timely motion.

In *Gualpa v Leon D. DeMatteis Constr. Corp.* (121 AD3d 416 [1st Dept 2014]), the Court held that a court may decide an untimely cross motion, albeit "it is limited in its search of the record to those issues or causes of action "nearly identical" to those raised by the opposing party's timely motion."

The case cited to by Defendants, *Hesse v Rockland County Legislature*, 18 AD3d 614 [2d Dept 2005], is procedurally distinguishable as it involved a late motion for summary judgment following a mistrial, while what is before this Court is a late cross motion for dispositive relief raising issues "nearly identical" to those raised by Defendants in their motion.

Labor Law §§ 200 and 240 (1)

Plaintiff does not oppose the portion of Defendants' motion seeking dismissal of his Labor Law §§ 200 and 240 (1) claims. In fact, in his cross-motion, Plaintiff expressly withdraws these claims against Defendants (NYSCEF doc No. 70, ¶ 2). In view thereof, the Court dismisses Plaintiff's Labor Law §§ 200 and 240 (1) claims as withdrawn

Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]).

While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

While Plaintiff initially alleged violation of a number of Industrial Code sections, his Cross-Motion and Opposition was limited to 12 NYCRR §§ 23-1.5(c)(1)-(2), 23-1.7(b)(1) and 23-1.7(e)(1)-(2). Therefore, all of Plaintiff's claims relating to Industrial Code violations, other than those discussed in his Cross-Motion and Opposition, are dismissed as abandoned (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]).

Industrial Code Section 23-1.5(c)(1)-(2)

Section 23-1.5(c)(1)-(2) provide as follows:

> "(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
> (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon."

Plaintiff argues that Defendants violated the provisions above as the metal mesh in this case was "not in good repair" and "did not safely support the load thereat". Defendants, however, argue that Section 23-1.5(c)(1)-(2) are too general to serve as Labor Law 241(6) predicates.

The Court finds for Defendants. The First Department has held that "12 NYCRR 23-1.5(c)(1) and (2) are "too general to serve as Labor Law § 241(6) predicates." (*Ortega v Trinity Hudson Holding LLC* (176 Ad3d 625 [1st Dept 2019]; *Jackson v Hunter Roberts Constr. Group LLC*, 161 AD3d 666 [1st Dept 2018]).

The court in *Becerra v Promenade Apts. Inc.* (126 AD3d 557 [1st Dept 2015]), to which Plaintiff himself cites, explained that Section 23-1.5 (c)(1) and (2) "employ general phrases" only. In contrast, Section 23-1.5 (c)(3), which states that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged," is the paragraph which "mandate[s] a distinct standard of conduct, rather than a general reiteration of common-law principles and [is] precisely the type of 'concrete specification' that [is] require[d]." Here, Plaintiff relies only on Section 23-1.5 (c)(1) and (2), but not on Section 23-1.5 (c)(3). This is also why Plaintiff's reliance on *Perez v. 286 Scholes Street Corp.* (134 AD3d 1085 [2nd Dept 2015]) is misplaced. *Perez* involved an allegation of violation of Section 23-1.5(c)(3).

As Section 23-1.5(c)(1) and (2) do not set forth a specific standard of conduct, they cannot serve as predicates for Plaintiff's Labor Law 241 (6) claim. Therefore, Plaintiff's Labor Law 241 (6) claim premised on these provisions are dismissed.

Industrial Code Section 23-1.7(b)(1)(i)

Section 23-1.7(b)(1)(i) provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

While the term "hazardous opening" is not defined in Section 23-1.7 (b)(1), courts have maintained that this provision only applies to openings "of significant depth and size" (*Lupo v Pro*

Foods, LLC, 68 AD3d 607, 608 [1st Dept 2009]; *see also Urban v No 5 Times Sq. Dev LLC*, 62 AD3d 553, 556 [1st Dept 2009]). The First Department has opined that the openings contemplated by 23-1.7(b)(1) "all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit" (*Messina, supra,* at 123–24).

Here, while Plaintiff testified that the steel mesh over which he tripped was "covering a hole" (NYSCEF doc No. 62, 134:2-3), he does not claim that the mesh was an insufficient cover to prevent workers from falling into said hole. In fact, he testified that the mesh had to be put in place; otherwise "somebody would have went [sic] into the hole and landed on the 11th floor" (Id., 137:16-19). Therefore, while Plaintiff claims that the metal mesh caused him to trip and fall on his knees, he does not claim that the same could have caused him, or any other workers, to fall through the mesh into the beam and all the way through the floor below.

The cases cited to by Plaintiff do not help his case. In *Gjeka v Iron Horse Transpor, Inc.* (151 AD3d 463 [1st Dept 2017]), the plaintiff was injured when he fell into an "unguarded trench in the road measuring five to eight feet deep." Necessarily, 23-1.7 (b)(1) applies as the trench was not protected by any covering or guardrail as required by the said statute. In *Restrepo v Yonkers Racing Corporation, Inc.* (105 Ad3d 540 [1st Dept 2013]), on the other hand, the plaintiff "was injured when an access door in the floor of the soffit, or attic, where he was working opened downward, causing him to fall approximately 12 to 13 feet to the floor below." The *Restrepo* court upheld the summary judgment granting plaintiff's 23-1.7 (b)(1), holding that there can be no "triable issue as to whether the access door [was] sufficiently substantial or adequately fastened in place to guard the hazardous opening." Here, Plaintiff does not make any issue as to the sufficiency of the metal mesh to guard him from falling to the 11th floor. Finally, the case of *Keegan v. Swissotel N.Y. Inc.* (262 AD2d 111 [1st Dept 1999]) is also distinguishable. In *Keegan*, there were

numerous "uncovered openings", including a hole with an unfastened plywood cover through which Plaintiff fell. Here, while Plaintiff claims that the mesh was improperly fastened, he does not claim that this condition could have caused him to fall to the 11th floor. Rather, what Plaintiff maintains is that "had the protrusion part fastened down…[he] would not have tripped [over it]."

As the facts of this case do not presented the type of hazard that the statute intended to protect against, Plaintiff's Labor Law 241 (6) claim based on 23-1.7 (b)(1) should be dismissed.

Industrial Code Section 23-1.7(e)(1)

Section 23-1.7(e)(1) provides that "[a]ll 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.

As "passageway" is not defined in the 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" (*Quigley v Port Auth. of New York*, 168 AD3d 65, 67, [1st Dept 2018] quoting *Steiger v LPCiminelli, Inc.,* 104 A.D.3d 1246, 1250 [4th Dept. 2013]).

Here, the parties dispute whether Plaintiff fell in a "passageway" or in a "working area." Plaintiff described the area where the incident occurred as his "route to go back to work…the path to go through" (NYSCEF doc No. 62, 145:2-5), "route toward the ladder to go to work" (*Id.*, 151:20-21), "pathway toward the ladder" (*Id.*, 139:6-8) and the only way for him to get down from the 12th floor to the 11th floor where he was supposed to work (*Id.,* 116:23-25 ["Because it was the same way to go to the ladder to go downstairs to go to work. That was the only direction you could go."; 117:7-14 ["Q: Was that the only way for you to get down? A: Yes. Q: And that was the same way you had gone? A: To go up. Q: To go up? A: Yes."; 181:4-11 ["Q: If the area would you have any area where you were would have been cordoned other means of leaving getting coffee to get

to your floor? A: To where my work station was? Q: Correct. A: No."]). However, Plaintiff also described it as the area where other workers "were setting up to do [] work" (NYSCEF doc No. 62, 121:12-19; 137:8-9).

The differing depictions of the area where Plaintiff tripped raise an issue of fact as to whether the area constituted a "passageway". As the Code does not provide a formal definition of "passageway," courts have held that the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact (*See Prevost v One City Block LLC*, 155 AD3d 531, 535 (1st Dept 2017]). In his deposition testimony, Plaintiff gave differing accounts of the area where he tripped. Therefore, there is a question of fact as to whether Plaintiff tripped in a "passageway" or an open "work area" and the Court cannot declare that either party has demonstrated entitlement to summary judgment regarding a violation of 23-1.7 (e)(1).

Industrial Code Section 23-1.7(e)(2)

Section 23-1.7(e)(2) provides that "[t]he 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".

Defendants argue that the provision above is inapplicable as the metal mesh that Plaintiff tripped over was an integral part of the construction, it being "integral to erect the decking of the floor" and therefore "consistent with the work being performed" (NYSCEF doc No. 48, ¶ 55). Plaintiff, however, maintains that the mesh was not "integral" as it "is no different from safety netting covering an opening or plywood covering an opening, which are both used solely as safety devices and obviously gets removed before the final construction of the floor…" (NYSCEF doc No. 77, ¶ 7).

The Court finds for Plaintiff. Even assuming that the metal mesh was an integral part of the construction process, Defendants failed to address Plaintiff's allegation that a portion of the mesh was protruding up as it was not fastened down (*see* NYSCEF doc No. 62, 159:10-12; 173:10-11). Plaintiff maintains that this protrusion is a "sharp projection" within the meaning of the 12 NYCRR § 23-1.7(e)(2).

In *Lenard v 1251 Americas Associates* (241 AD2d 391 [1st Dept 1997]), the Court defined "sharp" as "clearly defined and distinct" such that "a distinct object jutting out from the rest of the floor's surface" falls within the definition. Here, Plaintiff testified that a portion of the steel mesh was vertically sticking up from the surface and caught his foot. Defendants, on the other hand, failed to raise any triable issues of fact as to the existence of said protrusion. Therefore, Plaintiff's claim under 12 NYCRR § 23-1.7(e)(2) should be granted.

CONCLUSION

Based on the foregoing, it is hereby

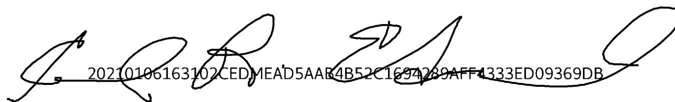
ORDERED that the branch of Defendants NYU Hospitals Center and Turner Construction Company's ("Defendants") motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's Labor Law claims is granted to the extent that the Labor Law §§ 200 and 240 (1) claims withdrawn by Plaintiff are dismissed; and it is further

ORDERED that the branch of Defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing Labor Law § 241 (6) claim is granted to the extent that Plaintiff's claims pursuant to Sections 23-1.5(c)(1)-(2) and 23-1.7(b)(1)(i) are dismissed; and it is further

ORDERED that the branch of Plaintiff's cross-motion (Motion Seq. 002), pursuant to CPLR 3212, seeking summary judgment granting his Labor Law § 241 (6) claim is granted to the extent that his claim pursuant to Section 23-1.7(e)(2) is granted.

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.



1/6/2021
DATE

CAROL R. EDMEAD, 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