

<b>Romano v New York City Tr. Auth.</b>
2021 NY Slip Op 32687(U)
December 17, 2021
Supreme Court, New York County
Docket Number: 153015/2014
Judge: Suzanne Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE ADAMS PART 21

Justice

-----X

MICHAEL ROMANO,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, FIVE
STAR ELECTRIC CORP., PROVIDENCE CONSTRUCTION
CORP.,

Defendant.

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INDEX NO. 153015/2014
MOTION DATE N/A
MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 501, 502, 503, 506, 520, 521, 522, 523, 524, 525, 526, 527, 528, 544 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and oral argument having been held virtually before the court on November 3, 2021, it is ordered that defendant/third-party plaintiff Five Star Electric Corp.'s ("Five Star") motion for summary judgment is denied, except that the portion of the motion seeking dismissal of the Labor Law § 240(1) claim is granted. This personal injury action arises out of an incident that occurred on August 26, 2013, at the site of the Mother Clara Hale Bus Depot construction project at 721 Lenox Avenue in Manhattan, owned by defendants/second third-party plaintiffs New York New York City Transit Authority and Metropolitan Transportation Authority (collectively, "Transit"). Five Star was the primary electrical subcontractor on the project. Plaintiff was employed by the non-party general contractor as a laborer at the site, charged with performing "clean-up" duties, among other things. On the date in question, plaintiff alleges he was instructed to clean up piles of masonry debris in a certain area of the worksite, and after

filling a wheelbarrow with debris at that area, he took one or two steps backward and fell on what he described as a piece electrical conduit that was on the floor.

Five Star now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims as against it. The motion is opposed by plaintiff and Transit, and partially opposed by defendant/third-party defendant/second third-party defendant Providence Construction Corp. and second third-party defendant Eaton Electric, Inc.

“The 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.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)); *see also Winegrad*, 64 N.Y.2d at 853. The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1<sup>st</sup> Dep’t 1989).

New York Labor Law § 200 codifies the common law duty of owners or general contractors to provide a safe construction site workplace, with the “implicit precondition to this duty . . . [being] that the party charged with that responsibility have the authority to control the activity bringing about the injury. . . .” *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-17 (1981). So too, Labor Law § 240 imposes liability only upon an owner or general contractor, or a third party who has been delegated the duties outlined in the statute and thus obtains the authority to supervise and control the work and becomes a statutory “agent” of the owner or contractor. *Russin*, 54 N.Y.2d at 317-18. Further, Labor Law § 241(6) provides, in pertinent part, that all contractors and owners and their agents shall provide “reasonable and adequate protection and safety” to

persons employed in “all areas in which construction, excavation or demolition work is being performed.” The statute imposes a nondelegable duty of reasonable care upon owners and contractors with respect to construction site safety, and has been held to also impose liability upon a general contractor for a subcontractor’s negligence, even in the absence of control or supervision. *Rizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 348-49 (1998). “To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation” which “constitutes a specific, positive command, not one that merely reiterates the common-law standard of negligence . . . [and is] applicable to the facts and be the proximate cause of the plaintiff’s injury. *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 271 (1<sup>st</sup> Dep’t 2007) (citations omitted). Here, plaintiff alleges violation of Industrial Code § 23-1.7(e)(2), which 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.”

Plaintiff alleges that on the date of the incident he was assigned to remove construction debris in a room on the third-floor mezzanine level of the bus depot, which room was still under construction. At one point, plaintiff filled a wheelbarrow with debris, and as he lifted the wheelbarrow handles and took a few steps back to “push off” with his load, he stepped on a piece of pipe, or conduit, and fell. Plaintiff testified that he recognized the conduit as the kind used by electricians, and that they were new because they had red plastic caps on the ends. (Affirmation in Support, Exhibit B, pp. 182, 186-87)

Viewing the evidence in a light most favorable to the non-moving parties, summary judgment must be denied to Five Star, with the exception of dismissal of the Labor Law § 240(1) claim, discussed below, as questions of material fact exist that can only be answered by the trier

thereof. Five Star has proffered testimony that, *inter alia*, the conduit in question was not Five Star's because of certain markings on the conduit and the fact that it was left on the floor rather than stored as per Five Star's usual practice. However, both plaintiff and Transit cite to testimony and other evidence that the material over which plaintiff fell was electrical conduit of the kind utilized by Five Star, and did in fact belong to Five Star. The evidence before the court does not conclusively show how and by whom the disputed condition was created, or whether Five Star was delegated any responsibility as an agent of the contractor to maintain or control the area where the disputed incident occurred or the construction materials in said area.

With respect to Labor Law § 240(1), such statute, known as the Scaffold Law, "... imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks [cite omitted]." *Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 124 (2015). This statute is not applicable to the incident at issue in this case, and as such, dismissal of this claim is appropriate.

Accordingly, it is hereby

ORDERED that Five Star's motion for summary judgment is denied, except that the part of the motion seeking dismissal of all claims, cross-claims, counterclaims and third-party claims under Labor Law § 240(1) is granted, and the remainder of the motion is denied.

This constitutes the decision and order of the court.

12/17/2021

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

  
HON. SUZANNE ADAMS

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

J.S.C.  
 OTHER  
 REFERENCE