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 TRANSPORATION AUTHORITY, FIVE STAR ELECTRIC CORP., PROVIDENCE CONSTRUCTION CORP.,

Defendant.

----------X

INDEX NO. 153015/2014

MOTION DATE N/A

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 465, 466, 467, 468, 498, 499, 500, 504, 511, 515, 516, 517, 518, 519, 529, 530, 533, 547, 548, 551, 552, 558, 559

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 the motion for summary judgment of defendants/second third-party plaintiffs New York New York City Transit Authority and Metropolitan Transportation Authority (collectively, "Transit") is denied, except that the portion of the motion seeking dismissal of the Labor Law § 240(1) claim is granted. The cross-motion for summary judgment of second third-party defendant Bonland Industries, Inc. ("Bonland") 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 Transit. Bonland was the HVAC 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.

Transit now moves for summary judgment on its claim for contractual indemnification against defendant/third-party plaintiff Five Star Electric Corp. ("Five Star"); on the issue of liability dismissing common law negligence claims and claims pursuant to New York Labor Law §§ 200, 240(1) and 241(6); and on the issue of liability dismissing various third-party claims for contribution and common law indemnification. Bonland cross-moves pursuant to CPLR 3211 and/or 3212 for summary judgment dismissing all claims, third-party claims, and cross-claims as against it. Transit's motion is opposed by Five Star and partially opposed by plaintiff, defendant/third-party defendant/second third-party defendant Providence Construction Corp., and second third-party defendant Eaton Electric, Inc. Bonland's cross-motion is opposed by Transit and partially opposed by Five Star and Providence Construction Corp.

"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 (1st 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 (1st 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."

Transit's Motion for Summary Judgment

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 C, pp. 182, 186-87)

Viewing the evidence in a light most favorable to the non-moving parties, summary judgment must be denied to Transit because the evidence presented suggests that questions of fact exist on each branch of its motion, with the exception of the Labor Law § 240(1) claim, as discussed below. First, with respect to its contractual indemnification claims against Five Star, Transit proffers 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. However, in opposing the motion Five Star has cited to other 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. Thus, only the trier of fact can determine whether there was any negligence by Five Star in creating a hazardous condition sufficient to trigger the indemnification provisions in Five Star's contract with the general contractor.

Likewise, factual questions exist regarding the Labor Law § 200 and general negligence claims, which militate against their summary dismissal. The evidence before the court does not conclusively show how and by whom the disputed condition was created, or whether Transit as the owner of the construction site had knowledge of the condition due to, for example, the alleged

presence of several Transit project managers on site during construction. The court notes that no party has opposed dismissal of the claim under Labor Law § 240(1), known as the Scaffold Law, which ". . . 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.

Finally, the Labor Law § 241(6) claim insofar as it is based upon violation of Industrial Code § 23-1.7(e)(2), cannot be dismissed, as there is sufficient evidence demonstrating that the floor of plaintiff's work area contained debris, in violation of said code provision, over which plaintiff tripped and fell, sustaining the claimed injuries. The law is clear that Transit, as owner of the construction site, has a nondelegable duty under Labor Law § 241(6) to maintain a safe worksite, regardless of whether Transit controlled or supervised the worksite, or that the specific entity who left out the disputed construction materials is as yet unknown. Moreover, the violation of Industrial Code § 23-1.7(e)(2) does not "merely constitute[..] 'some evidence of negligence'" which requires a finder of fact to weigh in on whether the acts constituting the alleged violation was reasonable under the circumstances. *See Chrisman v. Syracuse Soma Project, LLC*, 192 A.D.3d 1594, 1595-96 (4th Dep't 2021). Rather, Industrial Code § 23-1.7(e)(2) is clear in specifically commanding that construction tools and materials should not be left on the floor of a construction area.

Bonland's Cross-Motion for Summary Judgment

Bonland was the HVAC subcontractor at the underlying project, whose work was limited to HVAC sheet metal work. There is no evidence before the court establishing that Bonland had

contractual or other authority over plaintiff's worksite or his work activities, or that it had any contact with or connection to the materials at issue herein. The only contentions raised in opposition to Bonland's cross-motion are speculative and unsupported, and thus do not raise any issues of fact. *See Cabrera v. Rodriguez*, 72 A.D.3d 553, 554 (1st Dep't 2010).. As such, Bonland's cross-motion is granted. Accordingly, it is hereby

ORDERED that Transit'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; and it is further

ORDERED that Bonland's cross-motion for summary judgment is granted and the complaint and all cross-claims, counterclaims, and third-party claims are dismissed in their entirety as against Bonland; and it is further

ORDERED that the action is severed and continued against the remaining defendants, and 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 Bonland 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.

This constitutes the decision and order of the court.

12/17/2021
DATE

SUZANNE ADAMS, J.S.C.
HON. SUZANNE ADAMS
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