SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : PART C-2

----------X HON. THOMAS P. ALIOTTA

MICHAEL HICKEY,

Plaintiff, **DECISION AND ORDER**

-against - Index No. 750005/2017

THE CITY OF NEW YORK, THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION and TULLY/OHL JOINT VENTURE, LLC, Mot. Seq.: 003, 004, 005, 006

Defendants.

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Recitation of the following papers as required by CPLR 2219(a) numbered 1 to 11 were fully submitted on the 1st day of October 2021:

	Papers Numbered
(**MS_003**) Notice of Motion for Summary Judgment by Defendant Tully/OHL Joint Venture, LLC, together with Supporting Papers and Exhibits	1, 2
(MS_004) Defendants' Order to Show Cause for Protective Order to Stay Deposition of Defendant Tully/OHL Joint Venture, LLC, together with Supporting Papers and Exhibits	3, 4
(MS_003 & 004) Plaintiff's Affirmation in Partial Opposition to Defendant Tully/OHL Joint Venture, LLC's Motion for Summary Judgment and Order to Show Cause, together with Supporting Papers and Exhibits	5
(MS_005) Plaintiff's Notice of Motion for Partial Summary Judgment on Liability against The City of New York and the New York City Economic Development Corporation Pursuant to Labor Law §240(1) and Labor Law §241(6), together with Supporting Papers and Exhibits	6, 7
(MS_005) Defendants' Response to Plaintiff's Statement of Material Facts, Affidavits, Affirmation and Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment on Liability with Supporting Exhibits	8

Upon the foregoing papers, defendant Tully/OHL Joint Venture LLC's (hereinafter "OHL") motion for summary judgment (Seq. No. 003) and application for a protective order to stay the deposition of an OHL witness (Seq. No. 004) are granted, and the complaint is severed and dismissed as to OHL. Plaintiff's motion for summary judgment (Seq. No. 005) against defendants the City of New York (hereinafter the "City") and the New York City Economic Development Corporation (hereinafter "EDC") on his Labor Law §240(1) and §241(6) causes of action is denied. The City's and EDC's motion for summary judgment (Seq. No. 006) pursuant to Labor Law §§200, 240(1) and 241(6) is also denied.

This matter arises out of a construction site accident occurring on December 5, 2015 at the North Shore waterfront, near Front Street on Staten Island. Plaintiff, a "sandhog" laborer employed by OHL USA, claims to have sustained extensive personal injuries while working seven stories underground on the "Water Siphon Tunnel Project." The project involved the replacement of pipes running under the New York Harbor between Staten Island and Brooklyn. At the time of the accident, plaintiff was transporting two five-gallon water jugs to an underground work site so that cement could be mixed in wheelbarrows which had been placed inside one of the pipes the day before. To reach his work area plaintiff had to traverse beyond a 7 to 10 feet cement wall, which he did by climbing one ladder and descending a second ladder located on the other side of the wall. Once down on the tunnel floor, however, plaintiff was required to hoist/pull himself upwards three to five feet to enter the culvert of the pipe, so that he could leave the water jugs inside the wheelbarrows. Also positioned inside the pipe was a large welding machine which plaintiff had to navigate/climb over to reach the wheelbarrows.

The accident occurred on plaintiff's way out of the pipe, as he was hopping down after leaving a water jug. He described the accident as follows: "I leaned down then gave a little shove off to jump off…and I just hit something, automatically my right foot just pushed all the weight to the left and I fell on my left side into like the wall, into the floor" (*see* Plaintiff's August 3, 2016 50-h hearing; NYSCEF #71, 124:8-10). "As I exited the pipe, I landed on something with my right foot wrong. It was like a rock or two. It's usually a flat surface…I landed on my ankle the wrong way [and] fell to my left to prevent any more pain" (*id.*, 105:12-20). Plaintiff's Verified Bill of Particulars dated February 7, 2017 describes his fall as upon "slick and slippery rocks hidden beneath muck and an unlevel, hole laden, raised depressed and obscured surface" (*see* NYSCEF #35, para. 3).

Plaintiff testified that his foreman requested a stepstool or stepladder from the safety office so that the sandhogs could bridge the three to five feet distance between the ground and the culvert of the pipe, but was told to use an upside-down bucket instead (*see* Plaintiff's July 10, 2019 deposition (NYSCEF #127, 168-170). Additionally, plaintiff's hardhat flashlight was dim on the day of the accident, and he was waiting for his foreman to bring new batteries that morning (*see* NYSCEF #71, pp.125-128).

There were no witnesses to the accident, but plaintiff's partner, Bobby, who was on the other side of the wall, heard plaintiff's hardhat strike the pipe (*see* NYSCEF #71, pp. 138-139). Bobby helped plaintiff up to street level and into the safety office where plaintiff reported the accident before being driven to the emergency room at Richmond University Medical Center.

With respect to the reporting and drafting of the accident report (*see* NYSCEF #159), plaintiff testified that he spoke with a safety officer and his supervisor, Franco, in the safety office, and told both men: "I was exiting the pipe to grab my other water, and I jumped out, landed on something wrong, and my whole foot's killing me and I can't walk on it now" (*see* NYSCEF #71; p. 148, ll. 15-18). Plaintiff denies physically writing the accident report, signing the report, or being shown the report, and claims that the report, which reads in full: "*Michael stated that at the end of the previous shift on 12-4-15 he slipped and twisted his r[igh]t ankle. He did not report it at that time, he reported to work on 12-5-15 and while stepping off of the welding machine, his ankle gave way, re-twisting it again,*" is "inaccurate" (*id.*, pp. 152-154). The report was "prepared" and signed by safety supervisor, Tom Quinn (*see also* November 21, 2020 affidavit of Tom Quinn [NYSCEF #159]).

Plaintiff's Notice of Claim (NYSCEF #9) and Summons and Complaint (NYSCEF #2) allege violations of Labor Law §§ 200, 240(1) and 241(6) on the part of the City, EDC[1] and OHL for their roles as owners, agents, and general contractors of the Water Siphon Tunnel Project. A note of issue has not been filed in this action.

DEFENDANT OHL'S MOTION FOR SUMMARY JUDGMENT DUE TO WORKERS' COMPENSATION BAR [003] AND APPLICATION FOR A PROTECTIVE ORDER STAYING SCHEDULED DEPOSTION [004] IS GRANTED.

In support of its argument that plaintiff's recovery against OHL is barred as a matter of law pursuant to the Workers' Compensation bar imposed by Workers Compensation Law §§10, 11 and 29(6), OHL sets forth that at the time of the accident, plaintiff was employed by OHL/USA, one entity of the Tully/OHL Joint Venture, LLC (*see, e.g.*, February 23, 2021 affidavit of OHL/USA Inc.'s payroll manager, Dularmattie Singh [NYSCEF Doc. No 90] and the orders and records from the Workers' Compensation Board [NYSCEF #92] naming OHL/USA as plaintiff's employer). OHL argues that plaintiff's sole and exclusive remedy against OHL, his employer, is his workers' compensation benefits. Plaintiff opposes the motion.

New York courts have consistently held that where there is more than one employer in a joint venture, an employee for one employer is considered an employee of all employers in the joint venture (*see Felder v. Old Falls Sanitation Co.*, 39 NY2d 855 [1976]; *Mitchell v. A.F. Roosevelt Ave. Corp.*, 207 AD2d 388 [2d Dept. 1994]).

It is well settled that workers' compensation law provides the sole and exclusive remedy for an employee seeking damages from his employer for unintentional injuries incurred during the course of employment. Inasmuch as there is no question that plaintiff's paychecks were

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[1] EDC, the entity that "manages design and construction projects that are intended to promote economic development in the City" (*see* December 14, 2020 deposition of EDC's Brian Larsen; NYSCEF Doc. No. 164, p. 24), hired OHL as the general contractor for the Water Siphon Project.).

signed by OHL/USA, and that plaintiff was an employee of OHL/USA at the time of the accident, then the action against OHL must be dismissed. Plaintiff cannot elect to receive workers compensation benefits and simultaneously sue his employer in an action at law.

OHL's application to stay the deposition of its witness was made on an emergent basis since the deposition scheduled for April 22, 2021[2] was court ordered for that date (NYSCEF #115) well before OHL moved for summary judgment. Plaintiff opposes the application on the grounds that OHL has "information, records, photographs and other evidence describing the worksite conditions" (*see* Plaintiff's Affirmation in Partial Opposition, para. 3; NYSCEF #137) and seeks an order "requiring the City and EDC to produce records from OHL or be subject to non-party subpoena and to accept service of a non-party subpoena for both a witness and documents in order to conclude discovery in the action" (*id.*, para. 6). Plaintiff's opposition improperly requests affirmative relief from the City and EDC for OHL's records, which these codefendants have repeatedly denied having (*see* NYSCEF #149, para. 9). In any event, the discovery issue has been rendered moot since plaintiff already served non-party subpoenas pursuant to this court's April 29, 2021 compliance order (*see* NYSCEF #119).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW §§240(1) AND 241(6) CLAIMS [005] AND DEFENDANTS CITY AND EDC'S MOTION FOR SUMMARY JUDGMENT DISMISSNG PLAINTIFF'S CAUSES OF ACTION UNDER LABOR LAW §§240(1), 241(6) and 200 [006] ARE DENIED.

In support of his motion for partial summary judgment pursuant to Labor Law §240(1) (*i.e.*, the "falling worker" theory), plaintiff argues that neither the City as owner of the land and tunnel where the accident occurred, nor EDC, as manager of the project on behalf of the City, provided plaintiff with a ladder or scaffold to allow him to safely enter and exit the pipe, and that

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[2] The February 23, 2021 Order incorrectly cites the date for the deposition as April 22, 2020.

their failure to provide adequate and proper safety devices (instead of a bucket, which was ultimately refused; [*see* NYSCEF #127, p. 170, l. 4]) was a proximate cause of plaintiff's injuries. Plaintiff maintains that since defendants failed to provide him with a ladder for safe ingress and egress from the pipe, and since his accident resulted from an elevation related hazard, a *prima facie* violation of Labor Law 240(1) has been established as a matter of law and summary judgment on the Labor Law §240(1) cause of action must be granted.

In opposition to that branch of plaintiff's motion under Labor Law §240(1), defendants argue that (1) the statute is inapplicable because plaintiff's fall was not gravity related (*see* April 28, 2021 affidavit of City's expert, Dr. Angela Levitan, Ph.D.; NYSCEF #158) since plaintiff's injury resulted from stepping onto rocks, i.e., an occurrence that may have just as easily happened if plaintiff had stepped off a ladder; and more critically, (2) the November 21, 2020 affidavit of safety supervisor Tom Quinn (*see* NYSCEF #159), together with Quinn's December 5, 2015 accident report reflecting plaintiff's purported version that he injured his right ankle while stepping off the welding machine, rather than from falling because he had no ladder to get out of the pipe, creates a credibility issue which cannot be determined on a summary judgment motion.

"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 eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

This Court finds that while plaintiff met his *prima facie* burden for summary judgment pursuant to Labor Law §240(1), the defendants have successfully raised a triable issue of fact through the sworn statement of safety officer Tom Quinn, as to the applicability of Labor Law §240(1) in this case.

Labor Law §240(1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with *working at an elevation* proximately causes injury to a worker (see *Wilinski v. 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; [*emphasis supplied*]). Here, plaintiff's testimony that he slipped while hopping down several feet from the pipe contradicts Mr. Quinn's sworn statement that the already injured plaintiff reported that the accident occurred as he attempted to pass the welding machine. Accordingly, summary judgment in favor of plaintiff and in favor of defendants City and EDC on the Labor Law §240(1) cause of action must be denied.

Labor Law §241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). To establish a violation of this statute, and successfully oppose a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code (*id.*, at 503-505). Here, plaintiff has alleged Code violations related to tripping hazards (*i.e.*, 23-1.7 [e][1], [2]) and illumination (*i.e.*, 23-1.30).

Industrial Code Section 23-1.7 (e) (1) provides in relevant part that "all **passageways** shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping…" (*emphasis supplied*). Section 23-1.7 (e) (2) mandates

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...." for "**working areas**." Both Code sections have been held to be specific enough to support a claim made pursuant to Labor Law 241(6) (*see Murphy v. Columbia Univ.* 4 AD3d 200 [1st Dept. 2004]; *Laboda v. VJV Development Corp.,* 296 AD2d 441 [2d Dept. 2002]).

If a substance is an integral part of a construction site, then it does not constitute a foreign substance and is not actionable (*see* Industrial Code Section 23-1.7 (d); *Galazka v. WFP One Liberty Plaza Co., LLC,* 55 AD3d 789 [2d Dept. 2008]).

Based on the evidence before it, this court is unable to determine as a matter of law that the rocks upon which plaintiff allegedly slipped were an integral part of the underground construction site. Accordingly, plaintiff's motion for summary judgment based on the tripping hazards associated with his Labor Law §241(6) cause of action must be denied.

As for defendants' motion to dismiss plaintiff's Labor Law §241(6) cause of action, the court notes that plaintiff testified repeatedly at his several depositions that he was in a work area covered with muck, and that his accident occurred when he stepped onto rocks which were slippery and partially obscured by muck. Inasmuch as defendants have failed to establish as a matter of law that they provided plaintiff with adequate protection against a tripping hazard present in his working area, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law §241(6) cause of action as underpinned by violations of Industrial Code 23-1.7 (e) (1) and (2) is denied.

Industrial Code Section 23-1.30 relating to "Illumination" provides that "wherever persons are required to work or pass in construction, demolition and excavation operations, illumination shall not be less than 10-foot candles in any area where persons are required to work

nor less than five-foot candles in any passageway, stairway, landing or similar area where persons are required to pass." This section has been held to be sufficiently specific to support a claim pursuant to Labor Law §241(6) (*see Murphy v. Columbia Univ.*, 4 AD3d 200 at 202 [1st Dept. 2004]).

Here, defendants have failed to establish as a matter of law by submission of an expert affidavit or other proof that the lighting in the area met the foregoing requirements. There is at the very least a question of fact regarding adequacy of the lighting, particularly in view of plaintiff's testimony that he requested new batteries for his hardhat flashlight. Accordingly, the respective parties' motions for summary judgment under Labor Law §241(6) must be denied.

Finally, the City's and EDC's motion for summary judgment dismissing plaintiff's Labor Law §200 cause of action is denied. The testimony of EDC's Senior Vice President of the Capital Improvement Program, Brian Larsen, failed to establish that defendants lacked actual or constructive notice of the allegedly dangerous and poorly illuminated condition at the worksite (*see Alberici v. Gold Medal Gymnastics*, 197 AD3d 540 [2d Dept. 2021]).

Accordingly, it is

ORDERED, that the motions by defendant OHL are granted, and the complaint is severed and dismissed as to defendant Tully/OHL Joint Venture, LLC; and it is further

ORDERED, that the motions for summary judgment by plaintiff and by defendants City of New York and the New York City Economic Development Corporation are denied.

This constitutes the decision and order of the Court.

ENTER,

Dated: 12/6/2022

HON. THOMAS P. ALIOTTA, J. S. C.