SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 26

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RON PAUL and THAMARSHA PAUL,

Plaintiff,

-against-

85TH TENTH AVENUE ASSOCIATES, LLC., HENEGAN CONSTRUCTION CO., INC., ALPHABET, INC., and GOOGLE, INC.,

Defendants.

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Index No. 516877/2017

ORDER

HON. LISA S. OTTLEY, J.S.C.

Recitation as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion and Cross-Motion for Summary Judgment submitted on December 21, 2020.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. A-J]
Notice of Cross-Motion and Affirmation	4&5 [Exh. 1-12]
Affirmation in Opposition	7
Opposition & Reply Affirmation	8[Exh.1]
Supplemental Affidavits	
Exhibits	
Other [Memoranda of Law-Plaintiff and Defendants]	3 and 6

Upon the foregoing cited papers and argument held before this Court via virtual appearances of the attorneys for the respective parties, careful review of the moving papers and opposition thereto, the court finds as follows:

Plaintiff, Ron Paul commenced this action against defendants, 85th Tenth Avenue Associates, Inc., the owner of the premises, Alphabet Inc., and Google, Inc., tenants of the premises located at 85th 10th Avenue, New York, New York and Henegan Construction Company, Inc., the general contractor, to recover damages for personal injuries allegedly sustained in the course of his employment as a carpenter, while working at 85th 10th Avenue. Plaintiff alleges that while pushing an A-frame cart loaded with sheetrock on July 20, 2016, that his thumb was injured when the wheels of the A-frame cart he was pushing, got stuck going over a lip in the floor, causing the sheetrock to fall back on his hand.

Defendants move for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' complaint in the entirety. Plaintiffs cross-move for summary judgment pursuant

to CPLR §3212 on Labor Law §240(1), §241(6) and Industrial Codes (12 NYCRR) §§23-1.28(b) and 23-1.7(e)(1) and (e)(2), denying the defendants' motion for summary judgment on the issue of liability in its entirety and dismissal of the plaintiff's future lost earnings claim it the entirety.

Summary Judgment

It is well settled that in order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *See, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). A motion for summary judgment cannot be defeated by a "shadowy semblance of an issue." *See, Chaplin Associates v. Globe Manufacturing*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974).

Labor Law §§240(1)

Plaintiff alleges that the defendants are liable pursuant to Labor Law §240(1), as a result of defendants causing plaintiff to suffer a serious injury.

Labor Law §240(1), in pertinent part reads as follows:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. Whether the device provides proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his or her materials. *See, Melchor v. Singh* 90 A.D.3d 866, 935 N.Y.S.3d 106 (2nd Dept., 2011), *citing Duran v. Kijak Family Partners, L.P.*, 63 A.D.3d, 992, 883 N.Y.S.2d 226; *Tranchina v. Sisters of Charity Health Care Sys. Nursing Home*, 294 A.D.2d 491, 742 N.Y.S.2d 655; *Garieri v. Broadway Plaza*, 271 A.D.2d 569, 707 N.Y.S.2d 333; *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 702 N.Y.S.2d 373.

In order to prevail on a Labor Law §240(1) cause of action, a plaintiff must establish that there was a violation of the statute and that the violation was a proximate cause of his injuries. The single decisive question with respect to Labor Law §240(1) is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a significant elevation deferential. *See, Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009). "Without a significant elevation

differential, Labor Law 240(1) does not apply, even if the injury is caused by the application of gravity to an object." *See, Simmons v. City of New York*, 165 A.D.3d 725 (2nd Dept., 2018).

In the case at bar, the plaintiff has not shown that his injuries were the result of a physically significant elevation differential. The plaintiff was pushing an A-frame cart loaded with sheetrock that was caused to fall back onto his hand when the cart got stuck going over a lip in the floor. There is no evidence to support a claim that the plaintiff was subjected to a significant gravity-related risk contemplated by Labor Law §240(1).

Plaintiff cites *Touray v. HFZ 11 Beach Street, LLC*, 180 A.D.3d 807, 115 N.Y.S.3d 877 (1st Dept., 2020), which involved an accident similar to the one before this court, where the injured plaintiff and his co-workers were pushing a loaded A-frame cart when the wheels of the cart became stuck and the cart would not move. In *Touray*, *supra*, the boards tipped and fell onto the plaintiff's leg. The court held that "given the weight and height of the cement boards on the A-frame cart, the elevation differential was within the purview of the statute," *citing, Marrero v. 2075 Holding Co., LLC*, 106 A.D.3d 408 (1st Dept., 2013). The distinction between the case at bar and *Touray*, is there was evidence of a 4 feet by eight feet differential, as well as the fact that the cart tipped. The differential in this case was waist high and approximately one foot high. In addition, this case is distinguishable from *McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 939 N.Y.S.2d 538 (2nd Dept., 2012), where the court granted plaintiff partial summary judgment. In *McCallister, supra*, the right front wheel broke off and the co-worker/foreman pushed the scaffold towards the plaintiff pinning him against the wall. Furthermore, in *McCallister*, the plaintiff squatted down with the bars of the scaffold on his chest in order to pick up the wheelless end of the scaffold. Here, the wheel of the cart did not come off the cart, nor was there any testimony as to the wheels of the cart having come off, which was the case in *McCallister*, where the wheels had previously fallen from the bottom of one side of the scaffold.

Accordingly, plaintiff's Labor Law §240(1) claim is hereby dismissed, and plaintiff's cross-motion denying the dismissal of plaintiff's claim under §240(1) is denied.

Labor Law §241(6)

Next, the court will address plaintiff's Labor Law §241(6) claim. Labor Law 241(6) states as follows:

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.

The above provision imposes a non-delegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code. "To support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of the Industrial Code provision that is applicable under the circumstances of the accident. *See, Rivera v. Santos*, 35 A.D.3d 700 (2nd

Dept., 2006). A sustainable Labor Law §241(6) claim requires the allegation that defendants violated a provision of the industrial Code that contains "concrete specifications" *See, Ramcharan v. Beach 20th Realty, L.L.C.*, 94 A.D.3d 964 (2nd Dept., 2012).

Plaintiff alleges that the defendants violated the following Industrial Codes: 12 NYCRR 23-1.7(e)(1) and (e)(2); 23-1.22(a), (b), (b1-4), (c1) and (c2); 23-1.28(b).

12 NYCRR 23-1.7(e)(1) and (e)(2) states as follows:

(e) 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.

In *Spencer v. Term Fulton Realty Corp.*, 183 A.D.3d 441, 123 N.Y.S.3d 599 (2nd Dept., 2020), the court dismissed plaintiff's Labor Law §241(6) claim, "insofar as it was predicated on Industrial Code 12 NYCRR 23-1.7(e)(1) because neither plaintiff nor the cart that he was pushing actually tripped or slipped, *citing Serrano v. Consolidated Edison Co., N.Y., Inc.*, 146 A.D.3d 405 (1st Dept., 2017). In *Spencer, supra*, the plaintiff was pushing an A-frame cart when the wheels got stuck and the co-worker continued to pull causing the car to pin the plaintiff's hand against an iron jack, severing the tip of plaintiff's index finger.

Accordingly, this court finds that the plaintiff's Labor Law claims predicated on 12 NYCRR 23-1.7(e)(1) and (e)(2) are dismissed, inasmuch as the facts do not support the claim and the sections are not applicable herein.

With respect to the violation of 12 NYCRR 23-1.22(a), (b)(1-4), (c)(1) and (c)(2), which involves "structural runways, ramps and platforms" which deals with the proper construction directions and guidelines for runways, ramps and platforms to be constructed, the court finds the section inapplicable, inasmuch as there is no testimony that supports a claim that the accident involved a runway, ramp or platform. Therefore, plaintiff's Labor Law claims predicated on 12 NYCRR 23-1.22(a), (b)(1-4), (c)(1) and (c)(2) is hereby dismissed.

Plaintiff also alleges that the defendant violated 12 NYCRR 23-1.28(b) which reads as follows:

(b) Wheels and handles. Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles. Buggy handles shall not extend beyond the wheels on either side.

The court finds that an issue of fact exists as to whether the A-frame cart used by the plaintiff was defective. Although there is deposition testimony from the defendant's foreman, Mr. Casamassima, who testified that he inspected the carts and took carts out of service with a defect, conflicting testimony exists as to the condition of the cart utilized by the plaintiff, and whether the wheels on the cart were working properly. Plaintiff's deposition testimony indicates that there was a problem with the A-frame cart and he could tell that the wheels were broken or malfunctioning because the wheels were not moving correctly. In addition, there is testimony that the wheels were wobbling, facing outward rather than forward and getting stuck, which required force to be applied to the cart. The defendants have not demonstrated *prima facie* that this provision of the Industrial Code is inapplicable to the facts of this case.

Accordingly, defendants' motion and plaintiff's cross-motion for summary judgment on plaintiff's Labor Law claim predicated on 12 NYCRR 23-1.28(b) are denied.

Labor Law §200

Labor Law §200 is a codification of the common-law duty of an owner or employer to provide employees with a safe place to work. *See, Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 670 N.Y.S.3d 816. "This provision applies to owners, contractors, or their agents, who have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *See, Simmons v. City of New York*, 165 A.D.3d 725, 85 N.Y.S3d 462 (2nd Dept., 2018), *citing Paladino v. Society of N.Y. Hospital*, 307 A.D.2d 343, *quoting, Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 445 N.Y.S.2d 127. Under the statute, claims for personal injury fall into two categories: (1) those arising from an alleged defect or dangerous condition existing on the premises and (2) those arising from the manner in which the work was performed. A defendant may be held liable under this section for injuries arising from a dangerous condition on the premises if it created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition. *See, Ortega*, 57 AD3d 54, 61 (2nd Dept., 2008).

"Where a plaintiff's injures are alleged to have been caused by defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment dismissing causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both of the foregoing liability standards" (*Bennett*, 131 A.D.3d at 995-996, citing, *Reyes v. Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52 [2nd Dept., 2011]). "A defendant moving for summary judgment in such a case may prevail 'only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard' " (*Bennett*, 83 A.D.3d at 996, quoting *Reyes*, 83 A.D.3d at 52).

In the case at bar, the plaintiff alleges that the injury he sustained was caused by an alleged defect or dangerous condition existing on the premises, to wit, a ½ inch lip created by the partial demolition of the floor at the construction site that was present when he began work at the job. Thus, "[w]here an accident results from a dangerous condition at

the work site, a general contractor 'may be liable in common-law negligence and under Labor Law §200, only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it' " (*McLean v. 405 Webster Ave. Assoc.*, 98 A.D.3d 1090, 1093 [2nd Dept., 2012], quoting, *Sotomayer v. Metropolitan Transp. Auth.*, 92 A.D.3d 862, 864 [2012]; *see Schultz v. Hi-Tech Constr. & Mgt. Servs., Inc.*, 69 A.D.3d 701, 701-702 [2010]; *Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d 553, 556 [2009]; *Van Salisbury v. Elliott-Lewis*, 55 A.D.3d 725, 726 [2008]). "Constructive notice may be imputed to the general contractor if the dangerous condition is visible and apparent and existed for a sufficient length of time prior to the accident to permit the general contractor to discover it and remedy it" (*McLean*, 98 A.D.3d at 1093, citing, *Spindell v. Town of Hempstead*, 92 A.D.3d 669 [2012]). The witnesses' deposition testimony states that the defect in the floor at the construction site measured approximately ¾ of an inch in height. In addition, there were no complaints about the lip in the floor, and the plaintiff admitted having gone over the lip multiple times before with a cart, without a problem. Defendants argue that the defect in the floor is an integral part of the construction site and trivial. In opposition, the plaintiff argues that the defendant has failed to provide evidence as to an inspection at any time prior to the plaintiff's accident, to demonstrate the absence of prior actual or constructive notice.

'The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections' (*McLean*, 98 A.D.3d at 1093-1094, quoting, *Kennedy v. McKay*, 86 A.D.2d 597, 598 [1982]; *see Colon v. Bet Torah, Inc.*, 66 A.D.3d 731, 732 [2009]; *Wynne v. State of New York*, 53 A.D.3d 656, 658 [2008]), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact" (*McLean*, 98 A.D.3d at 1094, citing, *Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d at 555). To the extent those causes of action are also predicated on the existence of a dangerous or defective premises condition, the court finds that the defendants failed to meet its *prima facie* burden of proof. Defendants have not tendered any evidence that it did not create the ¾ of an inch in height lip in the floor. Similarly, defendants failed to provide evidence that the specific location had been inspected at any particular time prior to the plaintiff's accident so as to demonstrate the absence of prior actual or constructive notice. *See, Slikas v. Cyclone Realty, LLC*, 78 A.D.3d at 149, 908 N.Y.S.2d 117; *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598–599, 869 N.Y.S.2d 222; *Williams v. SNS Realty of Long Is. Inc.*, 70 A.D.3d 1034, 1035–1036, 895 N.Y.S.2d 528; *Pryzywalny v. New York City Tr. Auth.*, 69 A.D.3d 598, 599, 892 N.Y.S.2d 181.

Accordingly, defendants' motion to dismiss plaintiff's common-law negligence and Labor Law §200 claims are denied.

Lost Earnings Claim

"A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation." *See, Tarplay v. New York City Transit Authority*, 177 A.D.3d 929, 113 N.Y.S.3d 148 (2nd Dept., 2019), citing, *Deans v. Jamaica Hosp. Med. Ctr.*, 64 A.D.3d 742, 744, 883 N.Y.S.2d

580; *see Gore v. Cardany,* 167 A.D.3d 851, 852, 90 N.Y.S.3d 144; *Nayberg v. Nassau County,* 149 A.D.3d at 762, 51 N.Y.S.3d 160). "Unsubstantiated testimony, without documentation, is insufficient to establish lost earnings" (*Lodato v. Greyhawk N. Am., LLC,* 39 A.D.3d 494, 496, 834 N.Y.S.2d 239). In support of plaintiff's claim for lost and future earnings, the court finds that the plaintiff's testimony, in addition to the testimony of his expert witness is sufficient to support his claim for lost earnings and future earnings. *See, Nayberg v. Nassau County*, 149 A.D.3d 761, 51 N.Y.S.3d 160 (2nd Dept., 2017).

Accordingly, defendants' motion to dismiss plaintiff's claim for lost future earnings is dismissed.

Defendants' motion is granted in part and denied in part. Plaintiff's cross-motion for summary judgment in his favor and against defendants, on Labor Law §240(1), §241(6) and Industrial Codes (12 NYCRR) §§23-1.28(b) and 23-1.7(e)(1) and (e)(2) is denied.

This constitutes the order of this Court.

Dated: Brooklyn, New York
May 20, 2021

HON. LISA S. OTTLEY, J.S.C.
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