SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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FELIX PERALTA,

Plaintiff,

- v -

ERY TENANT LLC,BOARD OF MANAGERS OF 15 HUDSON YARDS CONDOMINIUM, HUDSON YARDS CONSTRUCTION LLC,TUTOR PERINI BUILDING CORP.

Defendant.

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INDEX NO. 157456/2018

MOTION DATE 08/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91 were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims is granted.

Background

Plaintiff contends that he was working at a job site owned by defendant ERY Tenant LLC on March 12, 2018 when he fell through a hole in the floor. He was working for a carpentry subcontractor and was gathering materials right before the accident (NYSCEF Doc. No. 81 at 113 [plaintiff's depo tr]). Plaintiff explained that he grabbed a ladder, one used to help accomplish his assigned task that day, and he started walking backwards (*id*. at 117-18). Plaintiff testified that "And, as I'm walking backwards, my foot went through the hole. As I fell through the hole, I'm falling I fling the ladder, and to stop my fall I used by elbows and I hit my back" (*id*. at 118). Only his left foot went through the hole and that his elbows prevented him from falling through to the floor below (*id*. at 118-21).

Plaintiff moves for summary judgment on his Labor Law § 240(1) claim on the ground that the accident was gravity related and that he fell through an opening in the floor. With respect to his Labor Law § 241(6) claim, plaintiff relies upon Industrial Code 23-1.7(b)(1)(i) which requires that every hazardous opening into which someone might fall has to be guarded by a cover or protected with a safety railing. He argues that no proper protection was provided here.

In opposition, defendants point out that plaintiff walked backwards in an active construction site and that it is disputed whether the opening into which plaintiff fell was fully covered. They insist that a violation of Labor Law § 240(1) do not necessarily stem from falling through an opening. Defendants argue that there is an issue of fact about whether plaintiff was the sole proximate cause of his accident and that the Industrial Code section upon which he relies does not afford him summary judgment on his Labor Law § 241(6) claim. They argue the Industrial Code section cited by plaintiff is not applicable Defendants maintain that the opening must be large enough for a person to fit through and plaintiff did not show that here.

In reply, plaintiff argues that defendants failed to address the binding precedent that holds that if a worker falls into a hole, he or she is entitled to summary judgment under Labor Law 240(1). He also insists that the hole was large enough for him to fall through and measured three feet in length by sixteen to twenty inches wide. Plaintiff argues that there are no inconsistencies in the records about the size of the hole.

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed

on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants the branch of the motion that seeks summary judgment with respect to liability on this claim. It is undisputed that plaintiff's left foot fell through a hole in the floor while he was working on the job site. He testified (and defendants did not point to any other conflicting eyewitness testimony) that he fell down to his waist and that he would have fallen through to the floor below if his elbows did not break his fall. That establishes plaintiff's prima facie burden for summary judgment.

Defendants' attempts to blame plaintiff and characterize him as the sole proximate cause for his accident are without merit. That plaintiff was walking backwards with a ladder when he fell into the hole might lead a fact finder to the conclusion that plaintiff contributed to his accident and subsequent injuries. But defendants did not sufficiently justify why there was a hole in the worksite without any safeguards or show that plaintiff knew about this hole and, essentially, chose to walk into it. Moreover, the work plaintiff was doing that day (snapping lines on the ceiling) had nothing to do with the hole and was not an essential part of the work being performed by plaintiff.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Here, plaintiff relies upon Industrial Code Section 23-1.7(b)(1)(i) which provides that "Every 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." While defendants are correct that the Appellate Division, First Department has held that this Industrial Code section only applies to an "opening large enough for a person to fit" (*Messina v City of New York*, 300 AD2d 121, 123, 752 NYS2d 608]), plaintiff offered uncontroverted testimony that the hole was big enough for him to fall through (three feet by sixteen to twenty inches). Only his elbows prevented that from happening. Based on the record, the Court finds that this section is applicable to the facts of this case and plaintiff is entitled to summary judgment on this claim.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for partial summary judgment with respect to liability on his Labor Law §§ 240(1) and 241(6) claims is granted.

8/23/2022
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE