SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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JOHN F MORALE,

Plaintiff,

- v -

50 HYMC OWNER LLC, HUDSON YARDS CONSTRUCTION II LLC, GILBANE BUILDING COMPANY

Defendants.

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INDEX NO. 153232/2020

MOTION DATE 02/14/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 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, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this personal injury action, plaintiff moves for an order granting him summary judgment against defendants on his Labor Law §§ 240(1) and 241(6) claims. Defendants oppose and cross-move for an order granting them summary dismissal of plaintiff's Labor Law §§ 241(6) and 200 and common law negligence claims. Plaintiff opposes the cross motion.

I. PERTINENT BACKGROUND

Based on the parties' statements and counterstatements of undisputed facts (NYSCEF 68, 103, 129, 130), the following pertinent facts are undisputed:

(1) On May 11, 2020, defendant 50 HYMC Owner LLC (Owner) owned premises located at 50 Hudson Yards in Manhattan, at which there was an ongoing construction project;

(2) Pursuant to an agreement between non-party ERY Development LLC, as Owner's agent, and defendant Hudson Yards Construction II LLC (HYCII), dated August

31, 2017, HYCII was the Executive Construction Manager for the project, and was responsible for certain activities, including the administration, management, and coordination of all construction activities for the project;

(3) Pursuant to a contract between HYCII and non-party Cross Country Construction LLC, HYCII hired Cross Country as the concrete subcontractor to erect the project's superstructure;

(4) Defendant Gilbane Building Company was identified as the General Contractor in the construction agreement between HYCII and Gilbane;

(5) On May 11, 2020, plaintiff was employed by Cross Country, and working on the 21st floor of the building at issue as instructed by a Cross Country foreman;

(6) Plaintiff was not familiar with the defendants and took his work orders only from Cross Country supervisors; and

(7) Plaintiff was injured when he fell through a hole in the floor to the floor below, approximately 15-20 feet.

Plaintiff testified as follows – on the accident date, he was cleaning up debris from the 21st floor, including plywood. He picked up a piece of plywood that had been placed near other plywood, which was not nailed to the floor and had no markings on it to indicate that there was a hole underneath it. After picking up the plywood at issue, he took a step forward and fell through the hole (NYSCEF 103, 129).

Plaintiff had not been provided with a harness or any device with which to tie off. Another Cross Country employee, who was cleaning with plaintiff on the accident date, testified that Cross Country employees had previously created the hole in the floor to put a device in it to pour concrete to lower floors (*id.*).

II. PLAINTIFF'S MOTION

A. Labor Law § 240(1)

1. Contentions

Plaintiff alleges that defendants are strictly liable for any Labor Law § 240(1) violations, and that defendants violated the statute by failing to ensure that the plywood covering the hole was secured against displacement and properly marked to indicate that a hole was underneath it. Defendants also failed to provide plaintiff with protection against falling through the hole (NYSCEF 68).

Defendants contend that triable issues exist as to whether plaintiff was performing a covered Labor Law activity at the time of his accident, and as to how the accident occurred and whether plaintiff was the sole proximate cause of it. They argue that cleaning is not a covered activity in this context, but even if it was, that plaintiff may have caused the accident by unsecuring or prying the plywood from the floor in order to pick it up (NYSCEF 126).

In reply, plaintiff argues that his cleaning activity is a protected activity as it was related to an ongoing construction project, and that there is no admissible evidence indicating that the plywood was secured to the floor before he lifted it up. He also observes that he cannot be the sole proximate cause of the accident if defendants violated the statute (NYSCEF 127).

2. Analysis

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

This statute "was designed to prevent those types of accidents in which, *inter alia*, the 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute imposes a "'flat and unvarying' duty upon the premises owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]); it is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Although cleaning is a covered activity under Labor Law § 240(1), in *Soto v J. Crew Inc.*, the Court held that an activity is not properly characterized as "cleaning" under the statute if it:

> (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project.

(21 NY3d 562, 568 [2013]). The presence or absence of any of these factors is not necessarily dispositive, "if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*id.* at 568-569).

Here, it is undisputed that plaintiff was employed by a concrete subcontractor, that he was working on an ongoing construction project, and that the cleaning he was performing on the accident date was part of the construction work for which Cross Country was responsible on the

project. Plaintiff thus demonstrates that he was engaged in a covered activity under the Labor Law when he was injured (*see e.g., Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014] [plaintiff established his Labor Law § 240(1) claim by testimony that he was performing work of cleaning debris from ground outside of building under construction, when he was hit by falling brick]).

Plaintiff further establishes that defendants violated the statute by failing to ensure that the plywood was adequately secured and/or to provide him with protection in order to prevent him from falling through the hole (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [plaintiff "established a prima facie violation of the statute by showing that the plywood cover on the hole was an inadequate safety device because it was not secured at the time of the accident"]; *see also Rubio v New York Proton Mgt., LLC*, 192 AD3d 438 [1st Dept 2021] [prima facie violation shown as plywood sheet covering trench gave way when plaintiff walked across of it, causing him to fall into trench]).

In opposition, defendants fail to raise a triable issue as to whether plaintiff was the sole proximate cause of the accident. There is no admissible evidence controverting plaintiff and a witness's testimony that the plywood was not secured and plaintiff did not unsecure it before lifting it, or evidence that plaintiff was provided with any safety protection. In any event, as plaintiff established a violation of Labor Law § 240(1), he cannot be the sole proximate cause of his accident (*see Francis v 3475 Third Ave. Owner Realty, LLC*, 213 AD3d 555 [1st Dept 2023] [as defective scaffold constituted statutory violation and caused accident, plaintiff could not be sole proximate cause of accident]).

Plaintiff is therefore entitled to partial summary judgment on liability against defendants on his Labor Law § 240(1) claim.

B. Labor Law § 241(6)

While plaintiff's Labor Law § 241(6) is rendered academic by a finding in his favor on his Labor Law § 240(1) claim (*see Malan v FSJ Realty Group II LLC*, 213 AD3d 541 [1st Dept 2023]), it is addressed nonetheless.

1. Contentions

Plaintiff asserts that defendants violated Industrial Code section (12 NYCRR) 23-1.7(b)(1), entitled "Protection from general hazards," which provides:

> (b) Falling hazards. (1) Hazardous openings.
>
> (i) 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 (rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
>
> *(*a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
>
> (*b*) An approved life net installed not more than five feet beneath the opening; or
>
> (*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Specifically, plaintiff contends that defendants violated the Industrial Code by failing to secure the plywood to the floor, to properly cover the hole, and to provide a safety railing or barrier, and further failing to provide protection to plaintiff to keep him from falling into the hole (NYSCEF 68).

Defendants argue that 12 NYCRR 23-1.7(b)(1) is inapplicable to plaintiff's accident as it would have been illogical to cover the hole, as it was necessary for Cross Country's work (NYSCEF 126).

In reply, plaintiff reiterates his earlier arguments (NYSCEF 127).

2. Analysis

Section 241(6) imposes a nondelegable duty that "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commission of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993] [internal quotation marks and citations omitted]). However, "to state a claim under [the statute], [a] plaintiff must allege that [a] defendant violated an Industrial Code regulation that sets forth a specific standard of conduct and is not simply a recitation of common-law safety principles" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022] [internal quotation marks, brackets, and citations omitted]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [holding that "the rule or regulation alleged to have been breached (must) be a specific, positive command" (internal quotation marks and citations omitted)]).

Here, plaintiff has established that defendants violated 12 NYCRR 23-1.7(b) by failing to provide protection to plaintiff to keep him from falling through the hole. Defendants failed to submit any caselaw to support their allegation that the section is inapplicable because the hole was in use during the construction project, and the section itself seems to cover situations involving holes that are in use, specifically section (ii) which explicitly pertains to a situation "(w)here free access into such an opening is required by work in progress." Thus, defendants fail to demonstrate that there are triable issues related to their violation of Labor Law § 241(6).

III. DEFENDANTS' CROSS MOTION

Defendants contend that they did not cause or create the hole in which plaintiff fell, nor did they have actual or constructive notice of it, and, moreover, they did not supervise and/or control the means and methods of plaintiff's work. They maintain that there is no proof of their actual notice, as there were no prior accidents or complaints related to the hole, nor evidence of constructive notice as plaintiff testified that he did not know who placed the plywood over the hole or how long it or the hole were present before his accident. Defendants also deny that they supervised, directed, or controlled the means and methods of plaintiff's work, as plaintiff only took direction from Cross Country supervisors (NYSCEF 126).

Plaintiff withdraws any claim that defendants created the hole, but argues that defendants had constructive notice based on the fact that they conducted daily inspections of the project, including inspecting hole coverings, and were responsible for ensuring that subcontractors properly covered holes, and had the authority to stop work until a hole was properly covered (NYSCEF 131).

In reply, defendants reiterate that there is no evidence as to how long the hole had been present, or that they ever received any complaints about it or knew of any prior accidents. They deny that general awareness of a condition is sufficient to constitute constructive notice (NYSCEF 132).

Labor Law § 200 codifies a landowners' and general contractors' common-law duty to maintain a safe workplace (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]). Claims pursuant to this section generally fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising

from the means or methods in which the work is performed (*see Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). Where, as here, the plaintiff's accident allegedly arose out of a dangerous or defective premises condition, an owner or general contractor may be held liable only if it created or had actual or constructive notice of the dangerous condition (*Raffa v City of New York*, 100 AD3d 558 [1st Dept 2011]).

Defendants establish that they had neither actual nor constructive notice of the open hole as plaintiff testified that he did not see the hole until he fell into it and he did not know how long the hole had been there, and as other witnesses testified that there were no prior accidents or complaints about the hole (*see Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012] [affirming dismissal of common law negligence and Labor Law 200 claims absent evidence defendants had actual or constructive notice of hazardous condition on sidewalk bridge; plaintiff testified that he did not notice defects in bridge before accident]).

In opposition, plaintiff raises a triable issue by evidence that defendants performed daily walkthroughs of the project, were responsible for making sure holes were properly covered, and had the authority to stop work if a hole was not properly covered (*see Herrero v 2146 Nostrand Ave. Assocs., LLC*, 193 AD3d 421 [1st Dept 2021] [issues of fact presented by evidence that contractor performed inspections to make sure equipment appeared safe, and its superintendent was onsite daily, performed daily walk-throughs to look for safety hazards, and had authority to remove unsafe equipment]; *DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467 [1st Dept 2019] [triable issues existed as to notice of hazardous condition of floor, as general contractor employed several superintendents on project who broadly supervised and controlled work site, and conducted multiple daily walk-throughs]; *Maggio v 23 W. 57 APF, LLC*, 134 AD3d 621 [1st

Dept 2015] [defendants did not establish lack of notice as there was evidence that employees walked through and inspected it]).

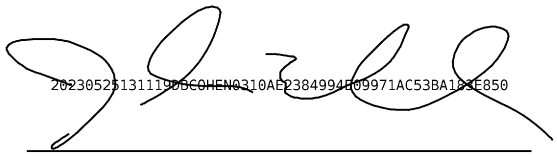
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability is granted as to his Labor Law § 240(1) claim, and his Labor Law § 241(6) claim is dismissed as academic; it is further

ORDERED, that defendants' cross motion is denied in its entirety; and it is further

ORDERED, that the parties are to appear for a settlement/trial scheduling conference on June 20, 2023, at 2:00 p.m., 71 Thomas Street, Room 305.



5/25/2023
DATE

DAVID B. COHEN, J.S.C.

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