SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DONALD CUMBERLAND,

Plaintiff,

- v -

BEN HUR AMSTERDAM LLC and HARAY GROUP, LLC

Defendants.

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INDEX NO. 160426/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 62, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

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

In this Labor Law action, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment against defendant Ben Hur Amsterdam LLC (Ben Hur) on the issue of liability under Labor Law §§ 240(1) and 241(6).

I. Factual and Procedural Background

This case arises from an incident on June 26, 2017, in which plaintiff was allegedly injured after falling down a set of stairs while working at a construction site located at 1341 Amsterdam Avenue in Manhattan (the premises), which was owned by Ben Hur (NYSCEF Doc Nos. 39, 41). Plaintiff commenced this action against defendants alleging claims of common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 39).[1] Ben Hur joined issue by its answer dated July 21, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 41). Plaintiff moves for partial summary judgment on the

[1] In his complaint, plaintiff did not mention Labor Law § 240(1) (Doc No. 39). However, in his bill of particulars he clearly mentions violations of the statute (Doc No. 43). Therefore, the portion of his partial summary judgment motion pertaining to Labor Law § 240(1) is proper.

issue of liability under Labor Law §§ 240(1) and 241(6) (Doc Nos. 36-37), which Ben Hur opposes (Doc No. 72).

Deposition Testimony of Plaintiff (Doc Nos. 45-47)

At his deposition, plaintiff testified that, on the day of the incident, he was employed by nonparty M&R Construction (M&R) and working on the premises. He was given instructions by his supervisor, who was the only person from whom he received instructions. He and a coworker were responsible for retrieving panels of sheetrock from a second construction site and taking them from the first floor down to the basement of the premises.

To reach the basement, plaintiff and his coworker had to individually carry the sheetrock down a staircase one panel at a time. The sheetrock was approximately 8-10 feet tall and as wide as plaintiff's wingspan. The staircase was the only way to enter the basement. It did not have handrails and it was dark; there were no lights inside the staircase and the only light came from behind the basement door at the bottom of the stairs. His coworker went first and successfully descended the staircase. As plaintiff proceeded down the stairs, he used his feet to guide himself and feel for the next step below. As he went to take a step, he tripped over a cord and fell to the bottom of the staircase.

Plaintiff was shown a photograph of the staircase (Doc No. 56). Although he acknowledged that the photograph displayed a handrail on one side of the staircase and a light hanging at its base, he stated that those items were not present on the day of his incident.

Deposition Testimony of Ben Hur (Doc No. 48)

A Ben Hur employee testified at his deposition that Ben Hur owned the premises and hired M&R to renovate them. Although he was unaware of plaintiff's accident, he was familiar with the layout of the premises. Prior to the renovation, the only way to access the basement was through

the cellar doors on the sidewalk outside the building; there was no staircase to the basement inside the premises.

Coworker Affidavit (Doc No. 50)

Plaintiff's coworker provided an affidavit in which he averred that he was working on the premises on the day of plaintiff's accident and witnessed him trip and fall down the staircase. A generator was used to provide lighting in the basement and the generator's power cord was "laid loose across the basement steps," unsecured to the wall or otherwise tied down. He even noted that he had to step over the cord to ensure he did not trip on it. He also confirmed plaintiff's testimony that there were no handrails in the staircase and that it was not well lit, as there were no lights hung in the staircase itself. After descending the staircase and entering the basement, he heard a noise and returned to the staircase where he saw plaintiff grabbing his ankle. He also averred that plaintiff fell because he tripped on the cord, and opined that such cable constituted a tripping hazard.

Incident Report (Doc No. 54)

An incident report was prepared by plaintiff's supervisor, although it was not signed by plaintiff. It indicated that plaintiff stated he slipped and twisted his ankle while carrying sheetrock down the staircase, and contained no mention of a cord laid across the stairs.

Recorded Statement of Plaintiff's Supervisor (Doc No. 74)

In October 2020, plaintiff's supervisor was interviewed by a private investigator. Although he stated that his answers were true and correct, he was not under oath at the time of the interview. He stated that he worked for M&R on the day of the incident, however, he was not at the premises when plaintiff's incident occurred because he was at a different job site. He received a call from one of plaintiff's coworkers, who explained that plaintiff was injured carrying a piece of sheetrock.

He was unsure why plaintiff was carrying sheetrock, and unsure of who instructed him to do so, because M&R was not supposed to move material and normally did not perform such tasks. When he returned to the premises on the day of the incident, he looked at the staircase and saw no defects.

Affidavit of Plaintiff's Expert (Doc No. 52)

In his affidavit, plaintiff's expert, a professional engineer licensed in New York, opined that the conditions of the premises violated Labor Law §§ 240(1) and 241(6). Regarding Labor Law § 240(1), the staircase was an inadequate safety device, because an additional handrail, proper lighting, and proper cord placement each would have individually prevented plaintiff from tripping and falling. With respect to Labor Law § 241(6), various sections of the Industrial Code were violated because the cord constituted a tool that was left scattered around the work area, obstructed the staircase, and should have been taped or attached to the wall, handrail, or some other support. The insufficient lighting also constituted an Industrial Code violation because it failed to satisfy the requirement of providing five to ten foot-candles of light, equivalent to that of public parking garages.

Affidavit of Ben Hur's Expert (Doc No. 75)

In his affidavit, Ben Hur's construction site safety expert opined that neither Labor Law § 240(1) nor Labor Law § 241(6) applied to plaintiff's accident. According to him, no violation of Labor Law § 240(1) occurred because plaintiff's accident was not gravity-related and the staircase "afforded plaintiff proper protection as [he] descended [it]." He also indicated that the staircase was properly constructed, properly equipped with a handrail, and free of defects. Regarding Labor Law § 241(6), he opined that there was no statutory violation because none of the the Industrial Code provisions identified by plaintiff were violated.

II. Legal Analysis and Conclusions

A. Plaintiff's Labor Law § 240(1) Claim

Plaintiff contends that he is entitled to judgment as a matter of law on his Labor Law § 240(1) claim because the staircase constituted an inadequate safety device provided by defendant. Ben Hur argues in opposition that the statute is inapplicable because plaintiff's accident resulted from him slipping on the staircase, not falling down it, and thus, his accident was not gravity-related. It further argues that the statute is inapplicable because plaintiff's accident occurred while he was performing work outside the scope of his employment, and that questions of fact exist regarding that issue.

"Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013] [citations omitted]; *see Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]). A plaintiff seeking summary judgment on the issue of liability "must establish that the statute was violated and that such violation was a proximate cause of his injury" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405 [1st Dept 2018]).

Ben Hur's contention that Labor Law § 240(1) is inapplicable is unavailing. Whether plaintiff's fall down the staircase was the result of slipping compared to tripping is irrelevant to the applicability of the statute (*see Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655, 655 [1st Dept 2018] [tripping]; *O'Brien v Port Auth. of N.Y. & N.J.*, 131 AD3d 823, 824 [1st Dept 2015], *affd* 29 NY3d 27 [2017] [slipping]); and it is well established that "[a] fall down a temporary staircase is the type of elevation-related risk to which [Labor Law § 240(1)] applies" and a staircase

"erected to allow workers access to different levels of the worksite[] is a safety device within the meaning of the statute" (*O'Brien*, 131 AD3d at 824).

Ben Hur is correct that Labor Law does not apply to workers injured while performing work outside the scope of their duties (*see e.g. Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979] [holding Labor Law only applies to individuals permitted to work on building or structure]). However, the only evidence presented by Ben Hur to establish that carrying sheetrock was outside the scope of plaintiff's employment was the recorded statement of his supervisor, which is hearsay evidence. "[Although] hearsay may be considered in opposition to a summary judgment motion, it is insufficient to defeat summary judgment where, as here, it is the only evidence upon which denial of summary judgment would be based" (*Clarke v Empire Gen. Contr. & Painting Corp.*, 189 AD3d 611, 612 [1st Dept 2020]).

Here, plaintiff has made a prima facie showing that he is entitled to judgment as a matter of law. His testimony, corroborated by the affidavit of his coworker, that the staircase was poorly lit, contained no handrail, and had a cord laid across it, established that Ben Hur violated Labor Law § 240(1) (*see Conlon*, 159 AD3d at 655 [granting partial summary judgment to plaintiff who demonstrated he tripped on extension cord and fell down stairs]).

In opposition, Ben Hur failed to demonstrate that triable questions of fact existed. First, its expert affidavit is replete with legal conclusions that the statute was inapplicable and, even if applicable, that it was not violated. Expert affidavits that "opine on the ultimate legal issue" in this way are not to be considered (*Police Benevolent Assn. of the City of N.Y., Inc. v City of New York*, 205 AD3d 552, 554 [1st Dept 2022]; *see Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 [1st Dept 2001] [declining to consider expert affidavit opining that violation of law was proximate cause of plaintiff's injuries]). The affidavit also contains conclusory statements that the staircase

contained adequate protection, which renders it insufficient for demonstrating triable questions of fact exist (*see Brown v Shurgard Stor. Ctrs. LLC*, 203 AD3d 453, 454 [1st Dept 2022] [holding conclusory expert affidavit did not create question of fact, even though properly considered]).

Second, although it submitted a photograph of the staircase showing a light hung near the base of the staircase and a handrail on one of its sides, it never established who took the photograph, when it was taken, or that it was representative of the staircase on the date of plaintiff's accident. Plaintiff acknowledged that the staircase in the photograph was the staircase upon which he fell, but when asked whether the photograph "fairly and accurately depict[ed]" the staircase at the time of his accident, he answered no. Third, and finally, plaintiff's supervisor's recorded statement cannot establish a question of fact exists for the same reason it could not establish that plaintiff was performing work beyond the scope of his duties—it is hearsay evidence that is the only support for denying summary judgment.

Therefore, plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim (*see Otero v 635 Owner LLC*, 210 AD3d 435, 436-437 [1st Dept 2022] [granting partial summary judgment to plaintiff after he made prima facie showing that statute violated and defendant failed to raise triable question of fact]).

B. Plaintiff's Labor Law 241(6) Claim

Since plaintiff is entitled to summary judgment on liability on his Labor Law § 240(1) claim, it is unnecessary to address his Labor Law § 241(6) claim; as his damages are the same under either theory of liability and he may only recover once, the issue is academic (*see Corleto v Henry Restoration Ltd.*, 206 AD3d 525, 526 [1st Dept 2022] [deeming issue of Labor Law § 241(6) claim academic after finding plaintiff entitled to partial summary judgment on Labor Law § 240(1) claim]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617-618 [1st Dept 2014] [similar]).

However, in an effort to aid any potential appellate review, plaintiff's Labor Law § 241(6) claim will still be analyzed.

i. Industrial Code §§ 23-1.7(e)(1) and (e)(2)

Plaintiff contends that he is entitled to judgment as a matter of law on his Labor Law § 241(6) claim because Ben Hur's failure to keep the staircase unobstructed violated 12 NYCRR 23-1.7(e)(1) and (e)(2), which require passageways to be kept free from obstructions or tripping hazards and working areas to be kept free of tools or materials, respectively. Ben Hur argues in opposition that no violation occurred because the staircase was not, in fact, obstructed. It asserts further that, even if plaintiff made a prima facie showing, triable questions of fact exist regarding whether the cord was present.

12 NYCRR 23-1.7(e)(1) "requires that all passageways shall be kept free from obstructions or conditions which could cause tripping" and that statutory responsibility "extends not only to the point where the work was actually being conducted, but to the entire site" (*Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005] [internal quotation marks, ellipses, and citations omitted]). In a similar vein, 12 NYCRR 23-1.7(e)(2) "provides that the parts of floors, platforms[,] and similar areas where persons work or pass shall be kept free from scattered materials, insofar as may be consistent with the work being performed" (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007] [internal quotation marks, brackets, ellipsis, and citations omitted]).

Here, plaintiff fails to demonstrate that 12 NYCRR 23-1.7(e)(2) is applicable. The staircase served as a passageway from the first floor to the basement, not as a working area (*cf. Conlon*, 159 AD3d at 655-656 [finding staircase where plaintiff *installing* sheetrock was working area under 12 NYCRR 23-1.7(e)(2) and not passageway under 12 NYCRR 23-1.7(e)(1)]).

However, he has made a prima facie showing that Ben Hur violated section 23-1.7(e)(1), based on the evidence establishing that the staircase was obstructed by the cord.

Ben Hur fails to raise a triable question of fact for the same reasons it failed to do so regarding plaintiff's Labor Law §240(1) claim. The lack of confirmation of the photograph, the insufficient expert affidavit, and the hearsay evidence from plaintiff's supervisor do not demonstrate that there is a question for a factfinder regarding whether the staircase was obstructed.

Therefore, plaintiff is also entitled to partial summary judgment on his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(1) (*see Cotroneo v Van Wagner Sign Erectors, LLC*, 210 AD3d 421, 422 [1st Dept 2022] [granting summary judgment on Labor Law § 241(6) claim after plaintiff made prima facie showing and defendant failed to demonstrate existence of triable fact]).

ii. Industrial Code § 23-1.7(f)

Plaintiff contends that it has made a prima facie showing that Ben Hur violated section 23-1.7(f)'s requirement to provide a staircase free of defects because the electrical cord on the staircase constituted a defect. In opposition, Ben Hur argues that no violation occurred because the staircase properly served as a "vertical passageway."

"12 NYCRR 23-1.7(f) imposes a duty upon a defendant to provide a safe staircase, free of defects" (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 493 [1st Dept 2010] [citations omitted]). However, a plaintiff's injuries must be "a result of a defect *in* the staircase or debris left thereon" (*Murphy v American Airlines*, 277 AD2d 25, 26 [1st Dept 2000] [emphasis added]), and the staircase must have served as "a means of access to different working levels" (*Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008] [denying dismissal of Labor Law § 241(6) claim predicated on section 23-1.7(f) because allegedly unsafe ramp was used

to access different working levels]; *see Sotarriba v 346 W. 17th St. LLC*, 179 AD3d 599, 601 [1st Dept 2020] [dismissing Labor Law § 241(6) claim because staircase not being used to access other working areas]).

Plaintiff fails to demonstrate that section 23-1.7(f) was violated. Although the staircase was being used to access different working areas on the premises, the cord was not a defect in the staircase itself or debris left upon it. Therefore, he is not entitled to partial summary judgment on his Labor Law § 241(6) claim predicated on section 23-1.7(f) (*see Murphy*, 277 AD2d at 26 [denying summary judgment because tool sliding down staircase did not constitute debris or defect in staircase]).

"In view of [plaintiff's] failure to establish [his] prima facie entitlement to judgment as a matter of law, there is no need to consider the sufficiency of the opposition papers" (*Zabawa v Sky Mgt. Corp.*, 183 AD3d 430, 431 [1st Dept 2020]).

iii. Industrial Code § 23-1.30

Plaintiff argues that it has made a prima facie showing that Ben Hur violated section 23-1.30 of the Industrial Code because the staircase failed to contain sufficient lighting. Ben Hur argues in opposition that the staircase was sufficiently illuminated.

12 NYCRR 23-1.30 "requires that owners and contractors provide illumination sufficient for safe working conditions" and provides specific standards, measured in foot candles, for such illumination (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 349 [1st Dept 2006] [internal quotation marks omitted]; *see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 734 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]). To obtain partial summary judgment on a Labor Law § 241(6) predicated on this statute, a plaintiff must show "that the amount of lighting fell below the specific statutory standard" (*Cahill*, 31 AD3d at 349; *accord Cruz v Metropolitan Tr. Auth.*,

193 AD3d 639, 640 [1st Dept 2021] [affirming dismissal of Labor Law § 241(6) claim because plaintiff failed to establish amount of light was below required levels]).

However, in making that showing, a plaintiff must provide more than "vague testimony that the lighting was 'poor' and the [area] where he fell was 'dark'" (*Carty*, 32 AD3d at 733-734; *see Cahill*, 31 AD3d at 349 [finding plaintiff failed to show statutory violation occurred when he presented vague testimony consisting of "conclusory and nonspecific assertions of two witnesses stating that the area was 'dark' or 'a little dark'"]; *cf. Favaloro v Port Authority of N.Y. & N.J.*, 191 AD3d 524, 525 [1st Dept 2021] [finding plaintiff made prima facie showing by presenting testimony that "the only lighting in the area he was working in was from floodlights some 80 feet above and that it was very dark"]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [finding witness testimony that lighting was "nonexistent" and work area was "pitch black" sufficient to demonstrate defendants violated Labor Law § 241(6) (internal quotation marks omitted)]).

Plaintiff has made a prima facie showing that the statute was violated. The witness testimony he presented provided detail about the lighting conditions, which is more in line with the facts of *Favaloro* and *Murphy*. Plaintiff testified specifically that there was "no lighting" in the staircase itself and that the only light was coming from behind the door to the basement at the bottom of the stairs (Doc No. 45 at 50-51). His coworker's affidavit corroborated this information as well; he averred that "the stairs were not lit," the only source of light was from behind the basement door, and "[t]here were not any lights hung in the staircase area itself" (Doc No. 50 at 2). Thus, the evidence amounts to more than vague testimony that the staircase was dark, and is sufficient to demonstrate that Ben Hur violated 12 NYCRR 23-1.30 (*see Favaloro*, 191 AD3d at 525; *Murphy*, 4 AD3d at 202).

For the same reasons explained above in sections B.i. and B.ii., Ben Hur fails to demonstrate that a triable question of fact exists.

Therefore, plaintiff is also entitled to partial summary judgment on his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.30 (*see Favaloro*, 191 AD3d at 525).

III. Conclusion

Plaintiff has made a prima facie showing that he is entitled to partial summary judgment on his Labor Law § 240(1) claim, and Ben Hur fails to raise a triable question of fact in opposition. Although that determination renders academic any discussion of partial summary judgment on plaintiff's Labor Law § 241(6) claims, if considered, he has made a prima facie showing that he is entitled to partial summary judgment on such claims predicated on 12 NYCRR 23-1.7(e)(1) and 23-1.30, and Ben Hur fails to raise triable questions of fact regarding those specific violations.

The parties' remaining contentions are either without merit or do not need to be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the branch of plaintiff's motion seeking summary judgment on the issue of liability under Labor Law § 240(1) as against defendant Ben Hur Amsterdam LLC is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment on liability under Labor Law § 241(6) as against defendant Ben Hur Amsterdam LLC is denied as academic; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff 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); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on November 29, 2023, at 9:30 a.m.

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9/8/2023
DATE

DAVID B. COHEN, 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**