SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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CHRISTOPHER MARTUCCI,

Plaintiff,

- v -

500 W25TH OWNER LLC,AVO CONSTRUCTION LLC,BENCHMARK CONTRACTING, INC.,HALAL BUILDING & CONSTRUCTION INC.,

Defendant.

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INDEX NO. 160927/2020

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 005 007 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 147, 157, 160, 191, 192, 197, 199

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 149, 153, 159, 162, 193, 198

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 194, 195, 200

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

Christopher Martucci ("Plaintiff"), a firefighter, commenced this action against 500 W25th Owner, LLC ("500 W25th"), Avo Construction LLC ("Avo"), Benchmark Contracting Inc. ("Benchmark"), and Halal Building & Construction Inc. ("Halal") to recover damages for injuries that he sustained when rescuing a construction worker who was injured in an excavation pit. The complaint asserts that defendants are liable for common-law negligence and pursuant to General Municipal Law § 205-a, predicated on violations of various Labor Law and Industrial Code provisions.

Avo and Benchmark (collectively "Defendants") now move for summary judgment and dismissal of Plaintiff's complaint. Additionally, Plaintiff moves for partial summary judgment with respect to the General Municipal Law § 205-a claim against Benchmark.

FACTUAL BACKGROUND

Plaintiff alleges that he responded to an accident on a construction site located at 500 W 25 Street, New York, NY on March 12, 2018. A construction worker had been injured at the bottom of a large excavation pit that was approximately 30-40 feet deep and Plaintiff was dispatched as part of the FDNY Special Operations Rescue Unit. After the injured worker was pulled up from the excavation pit, Plaintiff assisted in carrying him in a titanium basket from the perimeter of the pit, across the construction site, and to the ambulance. As Plaintiff was transporting the injured worker, Plaintiff alleges that he had to step over large amounts of debris and material, that he lost his footing, and that he felt a pop and shooting pain in his left leg and a strain in his arm.

In support of Defendants' and Plaintiff's motions for summary judgment, the parties included the relevant pleadings and the deposition transcripts of Plaintiff, Avo's representative, Jason Blauvelt, and Benchmark's representative, Alan Raferty. None of the parties provided photographs of the construction site or the location of Plaintiff's alleged accident.

Mr. Blauvelt confirmed that Avo was the general contractor for the subject construction project but stated that he otherwise had limited personal knowledge about the project. Mr. Raferty confirmed that Benchmark was hired as a subcontractor to perform foundation and concrete work. Mr. Raferty also testified that the construction site had a walkway outside of the excavation pit, that was five feet wide, and that the walkway was kept free of construction debris and was inspected daily by Avo.

LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*see Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]). "Since [summary judgment] deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." (*Andre v Pomeroy,* 35 NY2d 361, 364 [1974]).

DISCUSSION

Plaintiff asserts claims for common law negligence and General Municipal Law § 205-a, predicated on violations of Industrial Codes §§ 23-1.7(e)(1), 23-1.7(e)(2), and 23-2.1(a)(1). For the reasons discussed below, Defendants' motions for summary judgment are partially granted with respect to the claims for common law negligence and General Municipal Law § 205-a predicated on Industrial Code § 23-1.7(e)(1).

I. Negligence

As an initial matter, Avo set forth a prima facie entitlement to summary judgment with respect to Plaintiff's common-law negligence claim and Plaintiff did not oppose Avo's arguments

regarding common-law negligence. Accordingly, Avo's motion for summary judgment as to Plaintiff's common-law negligence claim is granted.

The common-law "firefighter rule" bars a firefighter or police officer from recovering for injuries sustained in the line of duty (*Galapo v City of New York*, 95 NY2d 568, 573 [2000]). In 1996, the legislature passed General Obligation Law § 11-106(1), which provides a cause of action for firefighters and police officers for on-duty injuries "proximately caused by neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee." However, the firefighter rule still provides that "police and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment" (*Kelly v City of New York,* 134 AD3d 676 [2d Dept 2015]). "[T]he rule bars an officer's . . . recovery 'when the performance of his or her duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury'" (*Wadler v City of New York*, 14 NY3d 192, 194-95 [2010] [quoting *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 436 [1995]).

Benchmark asserts that Plaintiff's common-law negligence claim is barred by the firefighter rule because Plaintiff was engaged in the rescue of a construction worker when he was injured. In opposition, Plaintiff asserts that he can recover for negligence under General Obligation Law § 11-106(1), and that Benchmark clearly owed a duty to Plaintiff because it was a contractor who created a dangerous condition with its debris and material, and that the dangerous condition caused Plaintiff's injuries.

Plaintiff's accident clearly occurred while he was performing his duties as a firefighter, as he was carrying a worker out of a construction site when he was injured. As such, Plaintiff's injuries were not merely incidental to him being at the site but directly related to the particular type

of risks that he would be expected to assume as part of his duties on the FDNY Special Operations Rescue Unit. Therefore, pursuant to the firefighter rule, Benchmark is entitled to summary judgment with respect to Plaintiff's common-law negligence claim (*see Kelly v City of New York*, 134 AD3d 676, 677 [2d Dept 2015] [finding common-law negligence action barred where police officer was injured while loading police barriers onto a flatbed truck]).

II. General Municipal Law § 205-a

General Municipal Law § 205-a provides an exception to the common-law "firefighter rule," (*Galapo v City of New York*, 95 NY2d 568, 573 [2000]). Under General Municipal Law § 205-a, a firefighter has a right of action where "'the negligence of any person . . . in failing to comply with the requirements of any statutes, ordinances, rules, orders and requirements of the federal, state . . . or [local] governments' 'directly or indirectly' causes the firefighter's injury or death during the discharge of his or her duties" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 77 [2003]). "[T]o make out a valid claim under General Municipal Law § 205-a . . . a plaintiff must '(1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the plaintiff was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the plaintiff'" (*id.* at 79).

"[A]s a prerequisite to recovery, a [firefighter] must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" (*Williams v City of New York*, 2 NY3d352, 363 [2004]). Moreover, violations of the Industrial Code may serve as a statutory or regulatory violation in support of a General Municipal Law § 205-a claim. (*Scollin v Theater for New City Found., Inc.*, 229 AD2d 355, 356 [1st Dept 1996]).

As an initial matter, Plaintiff's opposition papers to Defendants' motions and Plaintiff's own motion specify that Plaintiff is only alleging liability under General Municipal Law § 205-a predicated on violations of Industrial Codes §§ 23-1.7(e)(1), 23-1.7(e)(2), and 23-2.1(a)(1) (*see* NYSCEF Doc. No. 177 at ¶ 2; NYSCEF Doc. No. 192 at ¶ 14; NYSCEF Doc. No. 193 at ¶ 15). As such, Plaintiff's General Municipal Law § 205-a claims predicated on any other statutory or regulatory violations are dismissed.

a. Industrial Code § 23-1.7(e)(1)

Plaintiffs first assert that Defendants violated Industrial Code § 23-1.7 (e)(1), which provides:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from . . . obstructions or conditions which could cause tripping . . .

Defendants argue that Plaintiff has failed to establish that they violated Industrial Code §23-1.7(e)(1) because Plaintiff was not in a "passageway", as is required by the provision. Defendants argue that, under New York law, the area in which Plaintiff was walking cannot be considered a "passageway" pursuant to the Industrial Code because it was outside. Alternatively, Defendants assert that, even if the area qualifies as a "passageway", the deposition testimony shows that Plaintiff chose to step off the passageway and into an open area that was covered with debris.

In opposition, and in support of Plaintiff's motion for summary judgment, Plaintiff asserts that he was injured in a "passageway" because he was on a perimeter pathway that outlined the excavation pit. Plaintiff further argues that he only stepped off the pathway because it was not wide enough to carry the injured worker.

For the purposes of the Industrial Code, a "passageway" has been defined as "a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Smith v Extell W. 45th LLC*, 230 AD3d 1044, 1045 [1st Dept 2024] *quoting Quigley v. Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67, 90 NYS3d 156 [1st Dept. 2018]). Additionally, the First Department has clearly stated that a "passageway" pursuant to Industrial Code §23-1.7(e)(1) must be in an interior space. In *Quigley v Port Auth. of N.Y. & N.J.*, the First Department noted that a "passageway" "pertains to an interior or internal way of passage inside a building" and found that the plaintiff was not in a "passageway" when he slipped on snow covered pipes located outside of a doorway (*id.*, 168 AD3d at 67-68). The Court distinguished the case from *McCullough v One Bryant Park,* 132AD 373 [1st Dept 2015], noting that "[t]he accident involved in this case, caused by pipes in an outdoor area near the shanty door, is entirely distinguishable from an accident occurring in an internal hallway or interior side of a doorway" (*id.* at 68). Moreover, the Court has stated that the holding in *Quigley* "focused on the fact that the accident occurred in an outdoor area, not in the interior of a building," and that "since the area where the accident occurred was not in the interior of a building, it could not be a 'passageway' under 12 NYCRR 23-1.7(e)(1)" (*Potenzo v City of New York,* 189 AD3d 705, 707 [1st Dept 2020]).

Here, Plaintiff's deposition testimony clearly demonstrates that the alleged accident occurred outside, on, or around, a pathway around an excavation pit. Plaintiff testified that he accessed the construction site through a plywood construction fence and that he was transporting the injured worker from the perimeter of an excavation pit to an ambulance when he was injured (NYSCEF Doc. No. 188 at 42:19-44:19). As to the pathway, Plaintiff testified:

> A: . . . The pathway was only two or three feet wide. I had to leave. I had no choice, but to leave the pathway when carrying the individual…it was a wide open space, as far as a crane can get in it, but it was only a pathway of two or three feet in width to walk on and there was no place else to go.

(NYSCEF Doc. No. 188 at 161:16-25). Though the parties dispute whether Plaintiff was walking on the pathway at the construction site when he was injured, the evidence is clear that Plaintiff's accident occurred outside and not in an interior space. Accordingly, as a matter of law, Plaintiff's accident did not occur in a "passageway" and defendants are entitled to summary judgment with respect to General Municipal Law § 205-a predicated on Industrial Code § 23-1.7 (e)(1).

b. Industrial Code § 23-1.7(e)(2)

Plaintiffs next assert that Defendants violated Industrial Code § 23-1.7 (e)(2), which provides:

> (e) Tripping and other hazards.
>
> (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.

Defendants argue that Plaintiff failed to establish a violation of Industrial Code §23-1.7(e)(2) because Plaintiff was not working in the area where he was injured, and the incident did not occur in a "working area." Defendants assert that there is no testimony or other evidence showing that work was ongoing in the area where Plaintiff was injured. Specifically, Defendants point to Plaintiff's deposition testimony, in which he stated that "there was no possible way for them to even walk on what I was walking on, let alone safely work or walk" (NYSCEF Doc. No. 188 at 171:12-18).

Plaintiff argues that Benchmark's representative's deposition testimony demonstrates that work was done where the accident occurred. Specifically, Benchmark's representative, Mr. Raferty, stated that certain work would have been completed outside of the excavation pit:

> Q: So, specific to the work that Benchmark was performing within the pit, would there ever be an occasion where, let's say, between April of 2018 and May of 2018, where in order for the work to be done within the pit, certain activities or certain other work would have to be done outside of the pit . . .
> A: Acceptance of deliveries, maybe rebar got put up there, rebar was bent up there, generally stored materials to lead the job"

(NYSCEF Doc. No. 110 at 34:19-22). Additionally, Mr. Raferty testified that Benchmark's work created debris in the worksite (*id.* at 90-92).

The Court finds that an issue of material fact exists as to whether Plaintiff's accident occurred in a "working area." Plaintiff's testimony establishes that he was walking on, or near, the pathway by the perimeter of the excavation pit. Additionally, Mr. Raferty's testimony establishes that work was completed somewhere outside of the excavation pit. However, neither party has presented evidence beyond the three deposition transcripts of the parties, such as photographs or affidavits from other witnesses, that conclusively established that Plaintiff's accident occurred in the area where Benchmark's work was completed. As such, a material issue of fact exists as to whether Plaintiff's accident occurred in a "working area," precluding summary judgment as to Industrial Code 23-1.7 (e)(2).

c. Industrial Code § 23-2.1(a)(1)

Lastly, Plaintiff assert that Defendants violated Industrial Code § 23-2.1(a)(1), which provides:

> (a) Storage of material or equipment:
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Defendants argue that this Industrial Code does not apply because Plaintiff was not on a "passageway, walkway, stairway or thoroughfare" at the time he was injured. Specifically, Plaintiff testified that:

> A: . . . The pathway was only two or three feet wide. I had to leave. I had no choice, but to leave the pathway when carrying the individual…it was a wide open space, as far as a crane can get in it, but it was only a pathway of two or three feet in width to walk on and there was no place else to go.

(NYSCEF Doc. No. 188 at 161:16-25). Plaintiff also testified that the debris he stepped on was not located on the pathway:

> Q: The debris or objects you were walking over at the time you were hurt, was that debris within the two to three-foot pathway or off to the side of the two or three-foot pathway?
> A: That was off to the side. It was the perimeter of it.

(*id.* at 166:12-18). Additionally, Defendants argue that debris is not considered "material piles" under Industrial Code § 23-2.1(a)(1).

Conversely, Plaintiff asserts that his testimony clearly demonstrates that he was injured as a result of materials and debris. Specifically, Plaintiff stated "I had to climb over and step on concrete forms of all different shapes and sizes, buckets, cut pieces of plywood, bits of construction, concrete and the dirt that was hardened from you know, deep boot footprints and that's when the ground was just moving under me" (NYSCEF Doc. No. 188 at 65:3-11). Plaintiff further testified that he was in an area filled with debris and construction material:

> Q: Great. At the time that your incident occurred, were you on a pathway or were you on the – in the area that was just filled with debris?
> A: Area just filled with debris.
> Q: And when you're standing . . . When you're standing on all that stuff and walking, what happened if anything?
> A: Every time I stepped, my footing went up or down by six inches a foot, it was nothing was solid. Everything was moving underneath me, avoiding all the debris and stepping on some of it because I had no choice. The concrete forms of difference sizes were at different heights because they were stacked separately. Minimal space between all of this stuff, so you're literally stepping from one type of debris or construction material or another one, just trying to, you know, walk safely as you can.

(*id.* at 67:16-68:14).

The Court finds that an issue of material fact remains as to whether there were "material piles" on a "passageway, walkway, stairway or thoroughfare." Debris does not constitute "material piles" pursuant to Industrial Code § 23-2.1(a)(1) (*see Lourenco v City of New York*, 228 AD3d 577 [1st Dept 2024]). However, Plaintiff's deposition testimony presents conflicting accounts as to whether Plaintiff was only walking over debris, or also construction material. Plaintiff's testimony also provided contradictory accounts as to whether he was walking on a pathway. As the parties have provided no other evidence beyond the deposition transcripts, there remains material issues of fact, such that summary judgment as to § 23-2.1(a)(1) is precluded.

The Court has considered the remaining arguments and finds such unavailing.

Accordingly, it is hereby

ORDERED that Defendant AVO Construction LLC's motion for summary judgment (Motion Sequence 005) is partially granted with respect to Plaintiff's causes of action for common-law negligence and General Municipal Law § 205-a predicated on Industrial Code § 23-1.7(e)(1), and those causes of action are dismissed, and is denied in all other respects; and it is further

ORDERED that Defendant Benchmark Contracting, Inc.'s motion for summary judgment (Motion Sequence 007) is partially granted with respect to Plaintiff's cause of action for common-law negligence and General Municipal Law § 205-a predicated on Industrial Code § 23-1.7(e)(1), and those causes of action are dismissed, and is denied in all other respects; and it is further

ORDERED that Plaintiff Christopher Martucci's motion for partial summary judgment against Defendant Benchmark Contracting, Inc. (Motion Sequence 009) is denied.

The foregoing constitutes the order of the Court.

10/10/2025
DATE

LESLIE A. STROTH, 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