SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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EUGENE STRATIS and MARTA STRATIS,
Plaintiffs,

- v -

345 PARK AVE L.P., STRUCTURE TONE, LLC and BLACKSTONE ADMINISTRATIVE SERVICES PARTNERSHIP, LP,
Defendants.

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INDEX NO. 157849/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

345 PARK AVE L.P and STRUCTURE TONE,
Third-Party Plaintiffs,

-against-

NATIONAL ACOUSTICS, LLC and PAR FIRE PROTECTION/ PAR PLUMBING CO., INC.,
Third-Party Defendants.

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Third-Party
Index No. 595969/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for **AMEND CAPTION/PLEADINGS**.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104

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

Plaintiff Eugene Stratis[1] ("Stratis" or "plaintiff") was allegedly injured on August 27, 2020, while working on the 25th floor of the premises located at 345 Park Ave, New York, NY ("premises"). Plaintiff commenced this action against defendants 345 Park Ave L.P. ("345 Park"), the owner of the premises; Blackstone Administrative Services Partnership, L.P. ("Blackstone"), the entity leasing the premises at the time of plaintiff's injuries; as well as Structure Tone, LLC ("Structure Tone")[2], which was contracted by Blackstone to perform renovation work at the leased premises as general contractor. Plaintiff claims that, at the time of the incident, he was in the course of his employment with National Acoustics LLC ("National

[1]Plaintiff, Martha Stratis, is Eugene Stratis' wife, and asserts a loss of consortium claim.
[2] Structure Tone filed a third-party complaint against the third-party defendants, and defendant Par Fire Protection interposed an answer.

Acoustics"), a contractor/subcontractor hired by Structure Tone to perform construction, renovation, and/or demolition work at the premises. Stratis further claims that the alleged accident occurred when he "tripped on a bag of plumbing pipes" which defendant subcontractor Par Plumbing Co., Inc. ("Par Plumbing") had caused to be delivered (NYSCEF Doc. No. 6, *Notice of Impleader*). Plaintiffs assert the following causes of action: violations of Labor Law § 200 (first cause of action); Labor Law § 240(1) (second cause of action); Labor Law § 241(6) (third cause of action) and common law negligence (fourth cause of action). Plaintiffs also assert a loss of consortium claim against defendants (fifth cause of action) (NYSCEF Doc. No. 33, *amended verified complaint*).

In opposition, 345 Park, Structure Tone and Blackstone deny plaintiffs' allegations and assert several affirmative defenses (NYSCEF Doc. No. 38, *answer to amended verified complaint*).

Plaintiffs now move, for an order granting leave to amend their bill of particulars to assert a claim under Labor Law § 241(6) premised upon 12 NYCRR §23-2.1(a)(1), and pursuant to CPLR 3212, granting summary judgment in their favor and against defendants on their causes of action under Labor Law § 241(6) premised upon 12 NYCRR §23- 1.7(e)(2) and 12 NYCRR §23-2.1(a)(1); Labor Law § 200; and common law negligence (NYSCEF Doc. No. 43, *notice of motion*). Plaintiff argues that on August 27, 2020, he was instructed to work in a certain area which was filled with white bags emblazoned with the name Ferguson which contained pipefitting materials, narrowing the workspace. Stratis maintains that, as he was walking to his A-frame after completing several tasks, he stepped on one of the Ferguson bags, causing him to slip and his feet to go up in the air and he was injured as result. He contends that there were bags of pipes scattered over the floors in addition to other pieces of debris and garbage on the floor. The employer's injury report describes the injury as: "the employee slipped on plumbing pipes and when he went to catch himself, the pipes cut his left hand" (NYSCEF Doc No. `68, *worker's injury report*). Plaintiff argues that Robert Stellato ("Stellato"), Structure Tone's superintendent in charge of the 25th floor on which plaintiff was working, admitted in his deposition that the Ferguson bags would constitute a "mess" if someone was attempting to work in the area. Plaintiffs also attach photographs allegedly taken immediately after the accident in support of their claim that the Ferguson bags being placed in no particular order at various locations around the floor constitutes a tripping hazard in violation of 12 NYCRR §23-1.7(e)(2). Furthermore, plaintiffs assert that the pipefittings in the Ferguson bags were not integral to the work being performed by plaintiff and that, at the time of the accident, no work was being performed by other trades that would have installed the pipefittings. According to plaintiffs, if other subcontractors' materials were delivered in advance, said materials were supposed to be kept clear of the path of egress.

Plaintiffs also seek leave to amend the bill of particulars to assert a cause of action under Labor Law § 241(6) premised upon 12 NYCRR §23-2.1(a)(1), arguing that the new allegations are neither new nor raise a new theory. With regard to the merits of the claim under 12 NYCRR § 23-2.1(a)(1), plaintiffs proffer the deposition testimony of Peter Zgombic, a National Acoustics supervisor on the date of Stratis' accident, who testified that the Ferguson bags on the floor were untidy, should not have been stored on the floor, and that Structure Tone should have directed Par to move the bags since it was responsible for the procedures for delivery of materials.

Plaintiffs maintain that since the Ferguson bags were not properly stored and obstructed the means of egress, they have established their right to summary judgment under 12 NYCRR § 23-2.1(a)(1).

Turning now to plaintiffs claim under Labor Law §200 and for common law negligence, they contend that defendants had constructive notice of the defective condition of the premises based on the presence of the Ferguson bags in plaintiff's work area, which created a tripping hazard for workers at the site. In support, plaintiffs submit the affidavit of Donald MacFarlane ("MacFarlane"), National Acoustics' foreman on the date of the accident, wherein he avers that the day before the accident, he reminded Stellato that the job site needed to be kept tidy since various contractors were leaving construction materials all over the job site (NYSCEF Doc. No. 93, *Macfarlane affidavit*). According to plaintiffs, defendants were aware that the Ferguson bags posed a tripping hazard and should have removed them (NYSCEF Doc. No. 71, *plaintiffs' memo of law*).

In opposition, defendants[3] argue that plaintiffs' motion is premature because Par's foreman, Marino Lovric[4] ("Lovric"), who was responsible for coordinating delivery on the 25th floor on the date of the accident, is yet to be deposed. According to defendants, since Stratis claims that Par's steamfitters were the ones receiving delivery of the Ferguson bags that caused his injuries, Lovric's testimony is material because he was the person coordinating and overseeing the delivery and would know why the materials were place in the manner they were stored and for what purpose they would be used. Defendants posit that plaintiffs mischaracterize Stellato's testimony in that he did not testify that the manner in which the Ferguson bags were stored constituted a "mess"; rather, he explained that the manner in which the materials were stored did not constitute a dangerous condition if no one was working in that area. He further explained that all workers were advised in their safety training that they should move items that could block access to or impede movement in a particular working area. According to defendants, the bags would have been moved if someone would have brought it to Structure Tone's attention. Defendants further assert that Structure Tone's Project Superintendent Robert Murray, like Stellato, testified that the bags were kept away from egress; hence, he did not have to bring it to anyone's attention. Furthermore, Par's Project Manager, Vairo, testified that it was appropriate for Par workers to place bags around an area where another trade was working because here, the subject bag fittings were being used for ceiling pipes. Hence, defendants contend that the evidence adduced to date does in fact establish that the bags were integral to work being done and therefore, vitiates plaintiffs Labor Law §241(6) claim premised on a violation of 12 NYCRR § 23-1.7(e)(2).

Considering the Industrial Code 12 NYCRR § 23-2.1(a) claim, defendants claim that the available proof, such as the photographs (NYSCEF Doc. No. 76, *Exhibit B*), demonstrate that Stratis' work area and the subject bags were not in the way of egress as the hallway that Stratis traversed was some distance away.

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[3] These defendants, with the exception of National Acoustics, take no position with respect to that branch of plaintiffs' motion seeking to amend the Bill of Particulars.

[4] Par's Project Manager, Vincent Vairo ("Vairo"), who was in-charge of work being done at the subject site, testified that he was not available on the date of the accident and that Lovric was responsible for coordinating deliveries on the 25th floor.

Concerning the Labor Law § 200 and common law negligence claims, defendants set forth that the testimony from the depositions in this action demonstrate there is at least a question of fact as to whether the positioning of the bags created a dangerous condition. They argue that plaintiffs have not presented any evidence demonstrating that the bags he allegedly stepped on had been placed there before or after he started working on the column or whether they had been placed there immediately before Stratis began walking towards his A-frame (NYSCEF Doc. No. 84, *345 Park, Structure Tone and Blackstone's opposition*).

In addition to the arguments above, National Acoustics, opposes that branch of plaintiffs' motion seeking to amend the Bill of Particulars to assert a violation of Industrial Code § 23-2.1(a) as a predicate violation in support of the Labor Law § 241(6) claim, articulating that said relief should be denied because defendants will be prejudiced by the amendment, as they have not had an opportunity to conduct discovery on this new claim (NYSCEF Doc. No. 92, *National Acoustics opposition*).

Par opposes only that portion of plaintiffs motion seeking summary judgment on the claim under Labor Law §241(6). It argues that the deposition testimony of Lovric, on behalf of Par, is expected to address the critical issue of whether the steamfitter bags, over which plaintiff allegedly tripped, were integral to the work being performed at the time of the incident. Hence, Par contends that Lovric's testimony is critical as he may have specific knowledge of facts that are essential to formulate opposition to plaintiff's instant motion for summary judgment with respect to Labor Law § 241(6) claims. Furthermore, Par argues that Stellato's testimony raises factual issues as to the proximate cause of plaintiff's injury since it is possible that plaintiff cut his hand on his own sheetrock knife. The injury report, attached as Exhibit L, does not specify the tool or equipment that caused the alleged injury, but rather states that it could have been possibly caused by "construction debris on the floor" (NYSCEF Doc No. 57, *injury report*). Thus, there are triable issues of fact as to whether plaintiff's injury was attributable to an intervening and/or superseding cause, Par posits (NYSCEF Doc. No. 91, *Par's opposition*).

In reply, plaintiffs assert that the motion is not premature because it is undisputed that Stratis tripped over scattered materials that were strewn haphazardly on the floor which he was expected to traverse to reach his work area, in violation of Labor Law § 241(6). Plaintiffs also contend that defendants have failed to explain what the additional discovery is expected to reveal. They further argue that, assuming Lovric testifies that the Ferguson bags depicted in the photographs provided were placed in a manner consistent with Par's policies, this would not relieve defendants of liability if Par's methods violated the subject industrial codes. According to plaintiffs, the Ferguson bags were a tripping hazard and the disorderly way that they were stored was not integral to the work being performed. This is so, plaintiffs posit, because the available evidence establishes that the materials over which the plaintiff tripped were being staged for later work, and therefore, the Ferguson bags constituted scattered tools and materials in violation of 12 NYCRR §23-1.7(e)(2). Under 12 NYCRR §23-2.1(a)(1), plaintiffs maintain that the available evidence establishes that the Ferguson bags were not properly stored and that they obstructed the means of egress. They assert that the scattered Ferguson bags should not have been stored on the floor, and that Structure Tone should have directed Par to move the bags.

Addressing the Labor Law §200 and common law negligence claim, plaintiffs reiterate that defendants had constructive notice of the dangerous condition.

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> * * *
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998], quoting Labor Law § 241(6); see also *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Leveron v Prana Growth Fund I, L.P.,* 181 AD3d 449, 450 [1st Dept 2020).

12 NYCRR 23-1.7 (e)(2), subtitled "Working areas," requires that construction site owners keep "floors, platforms and similar areas where persons work or pass" 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." 12 NYCRR 23-1.7 (e)(2) is sufficiently specific to support a Labor Law § 241(6) claim (see *Randazzo v Consolidated Edison Company of New York,* 271 AD2d 667, 668 [2000].)

"A passageway is commonly defined and understood to be a typically long narrow way connecting parts of a building and synonyms include the words corridor or hallway. In other words, it pertains to an interior or internal way of passage inside a building" (*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]).

12 NYCRR § 23-2.1(a)(1) states that "[a]ll 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."

A Labor Law § 200 claim predicated on an alleged dangerous premises condition, requires a showing that defendant either created the dangerous condition or failed to remedy same despite having actual or constructive notice thereof (see *Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 494 [1st Dept 2022].

To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit a defendant owner to discover and remedy it" (*Lopez v Dagan*, 98 AD3d 436, 444 [1st Dept 2012]).

As an initial matter, this court grants that branch of plaintiffs' motion seeking an order granting leave to amend their bill of particulars to assert a claim under Labor Law § 241(6) premised upon 12 NYCRR §23-2.1(a)(1). It has been ably held that "[l]eave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). Defendants have not demonstrated that they will be prejudiced by the granting of said relief. That the parties may need to engage in further discovery regarding the claim premised upon 12 NYCRR §23-2.1(a)(1) is an insufficient basis to justify denial of leave of amend (see *Kim v White & Case LLP*, 216 AD3d 408, 408 [1st Dept 2023]). Specifically, the claim that the Ferguson bags were not properly stored and that they obstructed the means of egress in contravention of 12 NYCRR §23-2.1(a)(1) entails no new factual allegation or theories of liability (see *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 614 [1st Dept 2013]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

Here, upon review of the relevant statutes and case law, as well as the arguments advanced, the branch of the motion seeking summary judgment is denied as there are issues of fact pertaining to whether the Ferguson bags were placed in the way of egress and whether defendants had notice that the bags constituted a possible tripping hazard. As to the subject industrial code provisions, there is conflicting testimony as to whether the Ferguson bags were kept in such a manner so as to be considered scattered tools and materials within the meaning of 12 NYCRR 23-1.7 (e)(2). Furthermore, concerning the 12 NYCRR §23-2.1(a)(1) claim, from the picture depicting the workplace on the date of the accident, this court cannot conclusively establish that the Ferguson bags were stored in such a way that they obstructed the passageway or walkway used by Stratis.

Turning now to the Labor Law §200 and common law negligence claims, plaintiffs have not tendered proof that conclusively demonstrates when the bags were allegedly placed where Stratis fell, so as to give defendants constructive notice of same. It has been held that "a general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall" (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). Furthermore, there are presently questions of fact as to notice of the subject conditions that led to Stratis' injury causing accident. In addition, there are issues of fact as to whether the materials were integral to the work since Vairo testified that Par was performing

work with the subject materials in the area. Hence, testimony from Lovric is necessary to ascertain whether the pipefittings were integral to Par's work. Denial of summary judgment is appropriate, where, as here, there is outstanding discovery (see *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 624 [1st Dept 2015]). All other arguments have been considered and are either without merit or need not be addressed give the foregoing. Accordingly, it is hereby

ORDERED that plaintiffs motion is granted solely to the extent it seeks an order granting them leave to amend the bill of particulars to assert a claim under Labor Law § 241(6), and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants.

This constitutes the decision and order of this court.

March 18, 2024

HON. VERNA L. SAUNDERS, JSC

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**