SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

----------x

ROLANDO ROLDAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, MTA CAPITAL CONSTRUCTION CO., NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN & BRONX SURFACE TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, JTJ CONTRACTING, JUDLAU CONTRACTING, INC., THE JUDLAU COMPANIES and J-TRACK, LLC,

Defendants.

----------x

THE CITY OF NEW YORK, MTA CAPITAL CONSTRUCTION CO., NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN & BRONX SURFACE TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, JTJ CONTRACTING, JUDLAU CONTRACTING, INC., THE JUDLAU COMPANIES and J-TRACK, LLC.,

Third-Party-Plaintiffs,

-against-

PROVIDENCE CONTRUCTION CORP.

Third-Party-Defendant.

----------x

Mot. Seq. #s 16, 17, and 18

Index # 1370/2014

DECISION AND ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these Notice of Motions for Summary Judgment and Severance submitted on April 15, 2024.

Papers	Numbered
Notice of Motions and Affirmation	1&2 [Exh. A-CC] 8, 9, 17 (Exh. A-C], 18
Affirmation/Affidavit in Opposition	3, 4, 6, 11 [Exh. 3&7], 12 [Exh. A], 20
Reply Affirmations	7 [Exh. 1-2], 14

Memoranda of Law..... 4, 5, 10, 13, 15;16, 19, 21

Defendants/Third-party plaintiffs, The City of New York, MTA Capital Construction Co., New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Metropolitan Transportation Authority, JTJ Contracting, Judlau Contracting, Inc., the Judlau Companies, and J-Track, LLC (hereinafter, "the defendants"), move for summary judgment (Motion Seq. # 16) pursuant to CPLR § 3212 dismissing plaintiff's complaint on the grounds that defendants did not direct, control, or supervise any of plaintiff's work and did not cause or create the alleged hazardous condition or have actual or constructive notice of the alleged hazardous condition pursuant to Labor law § 200; the stairs plaintiff fell from was a permanent structure and does not fall within the scope of Labor Law § 240(1); and the plaintiff failed to identify a violated Industrial Code provision pursuant to Labor Law § 241(6). The defendants also move for summary judgment pursuant to CPLR § 3212 on its claims for contractual indemnification and breach of contract against third-party defendant, Providence Construction Corp. (hereinafter, "Providence"). Plaintiff opposes defendants' motion on the ground that the defendants have failed to make a prima facie showing entitling them to summary judgment.

Plaintiff moves for summary judgment (Motion Seq. # 17) on the issue of liability pursuant to CPLR § 3212 against defendants and to strike defendants' first, second, ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses. Defendants oppose plaintiff's motion on the grounds that the motion is untimely; Labor Law § 240(1) does not apply to permanent staircases that are reasonably safe, designed for outdoor use, and provide traction in inclement weather; plaintiff does not support his position with an expert; Labor Law § 241(6) does not apply since plaintiff's incident was not caused by a violation of an Industrial Code rule; and defendants' expert's affidavit creates triable issues of fact. Providence opposes plaintiff's motion on the grounds that plaintiff's conduct in disobeying specific instructions from supervisors raise issues of fact as to the sole proximate cause and recalcitrant worker affirmative defenses under Labor Law § 240(1); and Labor Law § 241(6) predicated on 12 NYCRR 23-1.7(d) does not apply since the staircase he fell from was not a passageway.

Providence supports the defendants' motion to dismiss plaintiff's complaint but opposes and cross-moves (Motion Seq. # 18) to dismiss defendants' third-party claims for contractual indemnification and breach of contract. Defendants oppose Providence's cross-motion (see defendant's reply in Motion Seq. # 16) on the same grounds they set forth in their motion to dismiss plaintiff's complaint. Defendants also oppose on the ground that Providence's expert has created the facts upon which to base his opinion. Plaintiff partially supports Providence's cross-motion to the extent that it agrees with Providence's argument that the defendants were negligent.

This action arises as a result of an accident which occurred on August 28, 2013, while plaintiff was entering a subway tunnel located at 11 Montague Street, Brooklyn, New York. The

plaintiff was a chipper and jackhammering operator for the Montague Site project, which was a construction project to rehabilitate the Montague subway tube that connects Brooklyn to Manhattan after damage inflicted by Hurricane Sandy. On his first day of working at the site, plaintiff was allegedly injured when entering the subway tunnel while descending a set of metal stairs on his way to his assigned work area. Plaintiff alleges that he was descending the stairs with his back facing the stairs when he slipped on the third stair due to water accumulating from rainfall and fell approximately 10 feet to the ground. The owner of the subject site is the City of New York, which leased the site to the New York City Transit Authority (hereinafter, "NYCTA") for a period of 99 years. NYCTA hired JTJ, a joint venture composed of Judlau and J-Track, as the general contractor for the Montague Site Project. JTJ retained Providence as a subcontractor to demolish the duct bank on both sides of the tunnel.

Discussion

It is well settled that in order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *See, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). A motion for summary judgment cannot be defeated by a "shadowy semblance of an issue." *See, Chaplin Associates v. Globe Manufacturing*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974).

Labor Law § 200

Defendants argues that they are not liable under Labor Law § 200 since they did not control or supervise plaintiff, his employment activities, or the way he performed his work on the date of the accident and were not involved with the way plaintiff descended and was instructed to descend the stairs. In support, defendants offer the deposition testimony of Providence's project manager, Tanner Johnson, who testified that plaintiff was given a safety orientation that was given to all new employees; he went through with plaintiff regarding what work was to be done on the site; advised plaintiff what to expect when working in the tunnel; and advised plaintiff on how to gain access to the site. Defendants allege that Mr. Johnson specifically instructed the plaintiff to descend the stairs while facing them. Defendants also argue that they did not cause or create the alleged dangerous condition and did not have actual or constructive notice of the alleged condition since there is no allegation that defendants caused or created the rain to fall or constructed the staircase. In support, defendants have offered an affidavit of its expert, Eugenia Kennedy, who opines that the stair's treads and coverings were sufficient to prevent slippage, especially if used properly. Ms. Kennedy further opined that this incident was solely caused by plaintiff's failure to follow the instructions provided by his supervisor Mr. Johnson at the safety orientation when he chose to descend the stairs while facing away from the threads.

Providence adopts the arguments and reasoning stated by the defendants in their motion seeking summary judgment dismissing plaintiff's complaint.

In opposition to defendants' motion, plaintiff argues that the defendants negligently exposed the plaintiff to the slipping hazard created when the metal ladder he was required to descend to reach his workplace became wet from rain. The defendants were negligent, careless, and reckless in the ownership, operation, management, and control of the premises at 11 Montague St. in Brooklyn. In addition, there is no evidence from the defendants denying that they created the dangerous condition that caused plaintiff's fall by creating an inadequate shed structure over the entrance to the stairs that leaked rainwater down onto the stairs that led down to the workplace. Plaintiff further argues that a worker could have wiped the steps down at the time of shift changes or the door of the shed structure could have been kept closed. The affidavit of the defendants' expert does not address whether the defendants took adequate steps to ensure that the structure over the mouth of the ladder was sufficient to keep water from rainfall from falling through the structure and running down the stairs. The expert also concludes that the plaintiff's boots made the surface of the stair treads reasonably safe to descend without testing of boots similar to the plaintiff's boots against a surface similar to the stairs. As to constructive notice, plaintiff argues that it is the defendants' burden to show that they made reasonable inspections that would have revealed the dangerous condition in time for them to have remedied it.

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide employees with a safe place to work. *See,* Cooper v State of New York, 72 A.D.3d 633, 899 N.Y.S.2d 275 (2nd Dept., 2016). Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed. See, LaGiudice v Sleepy's Inc., 67 A.D.3d 969, 890 N.Y.S.2d 564 (2nd Dept., 2009). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *See,* Ortega v. Puccia, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2nd Dept., 2008). Alternatively, where the injury arises out of defects or dangers in the methods or materials of the work, the property owner's potential liability hinges on his or her authority to supervise the work. See, Chowdry v. Rodriquez, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2nd Dept., 2008). To meet the initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. See, Gray v Lifetitz, 83 A.D.3d 780, 920 N.Y.S.2d 693 (2nd Dept., 2011).

In this case, plaintiff's claim appears to arise from an alleged defect or dangerous condition. As such, the defendants did not sustain a prima facie showing of entitlement to summary judgment dismissing the plaintiff's complaint as Labor Law § 200 and common-law negligence since defendants failed to establish that they did not have constructive notice of the dangerous condition. See, Medina v La Fiura Dev. Corp., 69 A.D.3d 686, 895 N.Y.S.2d 98 (2nd Dept., 2010). The defendants offered no evidence to establish when the stairway in question was last

inspected or cleaned prior to the time when the plaintiff allegedly fell. See, *Titov v V&M Chelsea Prop., LLC*, 230 A.D.3d 614, 216 N.Y.S.3d 677 (2nd Dept., 2024). Moreover, in opposition, plaintiff raised triable issues of fact as to whether the defendants created or had actual or constructive notice of the allegedly dangerous condition which caused the plaintiff's accident. See, *Linkowski v City of New York*, 33 A.D.3d 971, 824 N.Y.S.2d 109 (2nd Dept., 2006). Plaintiff offered his deposition testimony in which he testified that water was able to reach the stairs because the door to the shed structure had been left open. As such, there is a triable issue of fact as to whether defendants created or had actual or constructive notice as to the shed structure over the entrance to the stairs allegedly allowing rainwater to leak down onto the stairs.

Accordingly, defendants' motion (Mot. Seq. #16) for summary judgment dismissing plaintiff's complaint as to Labor Law § 200 is hereby denied. Plaintiff's motion for summary judgment (Mot. Seq. #17) on the issue of liability did not request any relief as to Labor Law § 200.

Labor Law § 240(1)

Defendants allege that they are not liable pursuant to Labor Law §240(1) since the staircase was a permanent structure and normal appurtenance and was not designed as a safety device to protect workers from an elevated risk. In support, defendants offer the deposition testimony of Providence's project manager, Tanner Johnson, who testified that the staircase was an existing permanent fixture at the worksite. Providence's assistance project manager, Calvin Lau, testified that that the workers were not provided with harnesses to descend this stairway because it would have interfered with the workers ability to descend the stairway. According to Mr. Lau, workers, including plaintiff, were instructed to use three points of contact when descending the stairs and fixed handrails to allow the workers so maintain three points of contact.

Providence adopts the arguments and reasoning stated by the defendants in their motion seeking summary judgment dismissing plaintiff's complaint.

In opposition, plaintiff argues that the structure used to get to his workplace was not a staircase, but a substandard fixed ladder device used to allow a worker to access the place where his covered work is to be carried out. The ladder is a device intended to protect the worker from the effects of gravity. The plaintiff further argues that he was entering his worksite by the only route available to him, climbing down an unsafe, slippery ladder.

Pursuant to Labor Law § 240(1), all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, 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, hangers, 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.

Labor Law § 240(1) imposes upon owners, contractors, and their agents a nondelegable duty to provide workers proper protection from elevation-related hazards. *See*, Zoto v. 259 W.10th LLC, 189 A.D.3d 1523, 134 N.Y.S.3d 728 (2nd Dept., 2020). Whether the device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials. *See*, Melchor v. Singh, 90 A.D.3d 866, 935 N.Y.S.3d 106 (2nd Dept., 2011), *citing* Duran v. Kijak Family Partners, L.P., 63 A.D.3d 992, 883 N.Y.S.2d 226 (2nd Dept., 2009); Tranchina v. Sisters of Charity Health Care Sys. Nursing Home, 294 A.D.2d 491, 742 N.Y.S.2d 655 (2nd Dept., 2002); Garieri v. Broadway Plaza, 271 A.D.2d 569, 707 N.Y.S.2d 333 (2nd Dept., 200); Nelson v. Ciba-Geigy, 268 A.D.2d 570, 702 N.Y.S.2d 373 (2nd Dept., 2000).

In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that there was a violation of the statute, and that the violation was a proximate cause of his injuries. The single decisive question with respect to Labor Law §240(1) is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a significant elevation deferential. *See*, Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009). "Without a significant elevation differential, Labor Law § 240(1) does not apply, even if the injury is caused by the application of gravity to an object." *See*, Simmons v. City of New York, 165 A.D.3d 725 (2nd Dept., 2018).

After careful consideration of the facts and the arguments presented, the court finds that that Labor Law § 240(1) is inapplicable and the plaintiff failed to raise a triable issue of fact since the permanent staircase from which the plaintiff fell was a normal appurtenance to the subway tunnel and was not designed as a safety device to protect from an elevation-related risk. See, Verdi v SP Irving Owner, LLC, 227 A.D.3d 932, 211 N.Y.S.3d 490 (2nd Dept., 2024). Here, it is undisputed that the stairway was attached and secured to the interior of the premises. The stairway was not a tool or device used in the performance of plaintiff's work. See, Gallagher v Andron Constr. Corp., 21 A.D.3d 988, 801 N.Y.S.2d 373 (2nd Dept., 2005). Where a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach. See, Gold v NAB Constr. Corp., 288 A.D.2d 434, 733 N.Y.S.2d 681 (2nd Dept., 2001). The plaintiff's argument that Labor Law § 240(1) is applicable because plaintiff fell from an unsafe, slippery ladder is unpersuasive. A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). See, Xidias v. Morris Park Contr. Corp., 35 A.D.3d 850, 828 N.Y.S.2d 432 (2nd Dept., 2006). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries. See, Melchor v Singh, 90 A.D.3d 866, 935 N.Y.S.2d 106 (2nd Dept., 2011). Here, plaintiff has failed to present admissible evidence demonstrating that the stairway or ladder was defective or inadequately secured.

Accordingly, defendants' motion (Mot. Seq. #16) for summary judgment dismissing plaintiff's complaint as to Labor Law § 240(1) is hereby granted. Plaintiff's motion for summary judgment (Mot. Seq. #17) on the issue of liability as to Labor Law § 240(1) is hereby denied.

Labor Law § 241(6)

Defendants argue that they are not liable under Labor Law § 241 (6) because the subject incident did not involve a violation of an Industrial Code provision. Plaintiff alleges violations of the following sections of the Industrial code: §§ 23-1.4, 23-1.5, 23-1.7(d), 23.1-7(e), 23-1.8, and 23-1.21(3). According to the defendants, the plaintiff has failed to plead violations of Industrial Code §§ 23-1.4, 23-1.5, 23-1.8, and 23-1.21(3) with specificity, but instead identified entire codes. As to Industrial Code §§ 23-1.7(d) and 23.1-7(e), they are either unsupported and/or not violated.

Providence adopts the arguments and reasoning stated by the defendants in their motion seeking summary judgment dismissing plaintiff's complaint.

Labor Law § 241 (6) imposes on owners, general contractors, and their agents a nondelegable duty to provide "reasonable and adequate protection" to workers engaged in construction, demolition, and excavation activities by complying with Industrial Code regulations that specify concrete safety directives, regardless of whether they exercised supervision or control over the work. See, *St. Louis v Town of N. Elba*, 16 N.Y.3d 411, 923 N.Y.S.2d 391 (2011). As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. *See, Misicki v. Caradonna*, 12 N.Y.3d 511, 515, 882 N.Y.S.2d 375, (2009). Section 241(6) imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite. See, *Ross v. Curtis-Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).

Industrial Code § 23-1.4

Defendants argue that Industrial Code § 23-1.4 is insufficient to give rise to a triable claim since the allegations rely on claimed failures to measure up to general regulatory criteria as "adequate," "effective" and "proper," which cannot be relied upon as the source of an owner's or general contractor's nondelegable duty to all workers assigned to perform construction chores on the premises. Plaintiff has not opposed defendants' argument as to Industrial Code § 23-1.4. Accordingly, the court concludes that the defendants have made their prima facie case that Industrial Code § 23-1.4 is insufficient to give rise to a triable claim. See, *Ross v. Curtis-Palmer Hydro–Elec. Co., supra*. The plaintiff has not opposed defendants' argument and thus has failed to raise a triable issue of fact.

Industrial Code § 23-1.5

Defendants argue that Industrial Code §§ 23-15(a), (b), and (c)(1) and (2) are not sufficiently specific to support a claim under Labor Law § 241(6). Defendants also argue that Industrial Code § 23-1.5(c)(3) does not apply since there was no testimony that the stairs were inoperable in anyway and there were no safety devices, safeguards, or equipment in use at the time of the accident. Plaintiff has not opposed defendants' argument as to Industrial Code § 23-1.5.

Industrial Code § 23-1.5(c)(3) provides that all safety devices, safeguards, and equipment in use shall be kept sound and operable and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Accordingly, the court concludes that the defendants have made their prima facie case that Industrial Code §§ 23-15(a), (b), and (c)(1) and (2) are insufficient to give rise to a triable claim. See, *Vernieri v Empire Realty Co.*, 219 A.D.2d 593, 631 N.Y.S.2d 378 (2nd Dept., 1995). The defendants have made their prima facie case that Industrial Code § 23-1.5(c)(3) is inapplicable since there was no evidence presented that the stairs were inoperable and there were no safety devices, safeguards, and equipment in use at the time of the incident. The plaintiff has not opposed defendants' arguments and thus has failed to raise a triable issue of fact.

Industrial Codes 23-1.7(d), 23.1-7(e)

Defendants argue that Industrial Code § 23-1.7(d) is inapplicable because the area where the accident occurred was not a floor, passageway, walkway, scaffold, platform or other elevated working surfaces. Defendants contend that stairways are not passageways since they are in an open and common area remote from the employee's worksite. In support, defendants offer the affidavit of their expert, Eugenia Kennedy, in which she attested that the staircase was safe if plaintiff had used the staircase as his supervisor had directed him. Defendants argue that Industrial Code 23-1.7(e) is inapplicable because plaintiff's accident did not occur in a passageway or working area. In addition, there is no evidence of plaintiff's accident being caused in anyway by accumulations of dirt and debris and from scattered tools and materials or from sharp projections. Rather, plaintiff testified that "it was a narrow-wet step and I just couldn't get proper footing on it."

In opposition, plaintiff argues that defendants exposed the plaintiff to a slipping hazard in the form of wet metal treads in the ladder he had to descend to reach his workplace. Plaintiff further argues that the surface on which the plaintiff slipped was elevated and courts treat entryways to and exits from work, especially ones that are solely used for that purpose, as part of the working area. The assertion of defendants' expert that plaintiff wearing slip-resistant boots rendered the wet stair non-slippery or negated defendants' obligation to remove a slippery substance is a conclusory opinion that is entitled to no weight.

Industrial Code § 23-1.7(d) provides that employers shall not allow any employee to use a "floor, passageway, walkway, scaffold, platform, or other elevated work surface which is in a slippery condition," and specifically enumerates ice and snow as foreign substances that must be removed, sanded, or covered.

In the case at bar, the court finds that the defendants have not made a prima facie showing that Industrial Code § 23-1.7(d) does not apply. The plaintiff's deposition testimony established that the stairway where the accident occurred was a passageway to and from the work site. See, *Linkowski v City of New York*, 33 A.D.3d 971, 824 N.Y.S.2d 109 (2nd Dept., 2006).

The areas that must be kept in a safe condition include not only the actual construction sites but the passageways the workers must travel through to get to and from those areas. See, *Bruder v 979 Corp.*, 307 A.D.2d 980, 763 N.Y.S.2d 667 (2nd Dept., 2003). Labor Law § 241(6) covers the entire construction site, from where the work is being conducted to the passageways utilized in the provision and storage of tools, in an effort to ensure the safety of workers going to and from the points of actual work. See, *Whalen v City of New York*, 270 A.D.2d 340, 704 N.Y.S.2d 305 (2nd Dept., 2000). The defendants' argument that the staircase was in an open and common area remote from the plaintiff's worksite is unavailing and not supported by admissible evidence. Plaintiff has made its prima facie case that Industrial Code § 23-1.7(d) does apply and that a violation of such section was a proximate cause of plaintiff's alleged accident. In opposition, defendants and Providence have failed to raise a triable issue of act.

Defendants argue that Industrial Code § 23-1.7(e) is inapplicable because plaintiff's accident did not occur in a passageway or working area. Also, plaintiff testified that he slipped on a wet step and there is no evidence of plaintiff's accident being caused in anyway by accumulations of dirt and debris, scattered tools and materials, or sharp projections. Plaintiff has not opposed defendants' argument as to Industrial Code § 23-1.7(e).

Industrial Code § 23-1.7(e) provides that all passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. 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.

Here, the court finds that the defendants have made a prima facie showing that Industrial Code § 23-1.7(e) does not apply based on plaintiff's testimony that he slipped on a wet step, not from accumulations of dirt and debris, scattered tools and materials, or sharp projections. The plaintiff has not opposed defendants' argument and thus has failed to raise a triable issue of fact.

Industrial Code 23-1.8(c)(2)

Defendants argue that Industrial Code § 23-1.8(c)(2) is inapplicable because Plaintiff was wearing proper boots that were slip-proof and reinforced with padding in conformance with Industrial Code 23-1.8(c)(2). Plaintiff has not opposed defendants' argument as to Industrial Code § 23-1.8(c)(2). Here, the court finds that the defendants have made a prima facie showing that Industrial Code § 23-1.8(c)(2) does not apply based on plaintiff's testimony that he was wearing slip-proof boots at the time of the accident. The plaintiff has not opposed defendants' argument and thus has failed to raise a triable issue of fact.

Industrial Code 23-1.21(b)(3)

Defendants point out that since Industrial Code 23-1.21(3) does not exist, the plaintiff is most likely relying on Industrial Code 23-1.21(b)(3). Defendants argue that Industrial Code 23-

1.21(b)(3) is inapplicable because there is no indication that the stairs were broken and defective as plaintiff avers that he fell on a wet step. Plaintiff has not opposed defendants' argument as to Industrial Code § 23-1.21(b)(3). Here, the court finds that the defendants have made a prima facie showing that Industrial Code § 23-1.21(b)(3) does not apply based on plaintiff's testimony that he slipped on a wet step, not from a broken or defective step. The plaintiff has not opposed defendants' argument and thus has failed to raise a triable issue of fact.

Accordingly, defendants' motion (Mot. Seq. #16) for summary judgment dismissing plaintiff's complaint as to Labor Law § 241(6) and Industrial Code §§ 23-1.4, 23-1.5, 23.1-7(e), 23-1.8(c)(2), and 23-1.21(b)(3) is hereby granted but denied as to Industrial Code 23-1.7(d). Plaintiff's motion for summary judgment (Mot. Seq. #17) on the issue of liability as to Labor Law § 241(6) and Industrial Code 23-1.7(d) is hereby granted.

Contractual Indemnification

Defendants argue that since they are free from negligence, Providence must contractually indemnify them. More specially, defendant, JTJ, negotiated an agreement under which Providence agreed to defend and indemnify the movants from any and all claims arising from Providence's work and claims brought by Providence's employees. The language of the indemnification provision in the agreement between JTJ and Providence shows the intention of Providence to indemnify the defendants with respect to the allegations in this case. Plaintiff has not addressed the indemnification claim between defendants and third-party defendant.

In opposition, Providence does not dispute that the plaintiff's claims arise out of Providence's work but argues that the defendants are not entitled to contractual indemnification since the sole basis for defendants' liability to the plaintiff is the defendants' own acts of affirmative negligence and they cannot be indemnified for their own negligence. Providence contends defendants were negligent in providing a safe place for the plaintiff to work as the defendants required all contractors to enter and exit the worksite by use of a staircase designated as an emergency hatch to exit the subway track and tunnel. Contractors were not permitted to construct their own means of access to the subject worksite and requests from the subcontractors to use an alternate accessway were rebuffed and refused. Specifically, prior to the plaintiff's incident, Providence's project manager, Tanner Johnson, expressed concern about the dangerous ladder and asked JTJ/Transit/MTA if there was another way to access the tunnels and he was told that was not even an option. According to the deposition testimony of Mr. Johnson, the way the ladder was constructed was dangerous because there were no handrails that extended beyond the floor surface as they stopped short of the top. The ladder was intended as an escape ladder from the tunnel. After the accident, JTJ built temporary handrails using 2X4s duct taped to the ladder to extend the handrail past the hatch exit. According to the affidavit of Providence's expert, Michael Cronin, the staircase was dangerous and defective because it did not extend at least 36 inches above the upper landing. This 36-inch minimum extension allows the user to mount the ladder safely before beginning their descent. The subject ladder utilized by plaintiff on the date of his accident contained no extension and required the user to kneel or lay on the ground to gain access to the ladder. According to the deposition testimony of

Providence's assistant project manager, Mr. Lau, JTJ employees were responsible for observing all workers going in and out of the stairs to ensure their safety. Specifically, Mr. Lau testified that a JTJ safety supervisor was positioned at the blue shanty and entranceway to the staircase to see who is going down to the tunnels so JTJ can watch out for the safety procedures and try to detect dangers on the project and try to alleviate any possible dangers.

A party's right to contractual indemnification depends upon the specific language of the relevant contract. See, *Gurewitz v City of New York*, 175 A.D.3d 658, 109 N.Y.S.3d 167 (2nd Dept., 2019). Here, the defendants have not made a prima facie showing that they are free from all negligence entitling them to contractual indemnification from Providence. To the contrary, this court has found that the defendants are negligent pursuant to Labor Law § 241(6) and Industrial Code 23-1.7(d).

Breach of contract and failure to name defendants as additional insured

Defendants argue that Providence breached its contract with JTJ by failing to name the defendants as additional insured on Providence's general liability policy with Phoenix Insurance company, a travelers' affiliate. Plaintiff has not addressed the breach of contract and failure to name defendants as additional insured claim between defendants and third-party defendant.

In opposition, Providence argues that it procured the requisite insurance coverage. In support, Providence has provided the certificate of insurance and insurance policy evidencing that defendants are named as additional insureds on Providence's commercial general liability policy. The defendants have not substantively replied to Providence's proof that it named the defendants as additional insureds on Providence's commercial general liability policy. As such, this court finds that the defendants have not made a prima facie showing for breach of contract.

Accordingly, defendants' motion (Mot. Seq. #16) for summary judgment on its claims for contractual indemnification and breach of contract against third-party defendant, Providence Construction Corp., is hereby denied. Providence's cross-motion (motion seq # 18) dismissing the defendants' contractual indemnification and breach of contract claims is granted.

Affirmative defenses

Plaintiff has moved to dismiss the defendants' affirmative defenses of culpable conduct, open and obvious, assumption of risk, lack of creation of defect, lack of actual or constructive notice, and no time to remediate or alleviate the unsafe condition. CPLR § 3211(b) provides that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. See, *CPLR § 3211* (b). When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law because they either do not apply under the factual circumstances of the case or fail to state a defense. See, *Bank of Am., N.A. v 414 Midland Ave. Assoc.*, LLC, 78 A.D.3d 746, 911 N.Y.S.2d 157 (2nd Dept., 2010).

Here, the affirmative defense of open and obvious is stricken as plaintiff has satisfied his prima facie burden of demonstrating that it has no merit, and a triable issue of fact has not been raised in opposition. The assumption of the risk defense is stricken since that doctrine is generally limited to risks arising from voluntary participation in athletic and recreational activities. See, *Depass v. Mercer Sq.*, LLC, 219 A.D.3d 801, 195 N.Y.S.3d 117 (2nd Dept., 2023). The affirmative defenses of lack of creation of defect, lack of actual or constructive notice, and no time to remediate or alleviate the unsafe condition are not stricken as there are triable issues of fact as to whether the defendants created or had actual or constructive notice of the allegedly dangerous condition.

As to the culpable conduct defense, to be entitled to summary judgment on the issue of defendants' liability, a plaintiff does not have bear the burden of establishing the absence of his or her own comparative negligence. See, *Rodriquez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018). Nonetheless, the issue of plaintiff comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moves for summary judgment dismissing an affirmative defense alleging comparative negligence. See, *Cui v. Hussain*, 207 A.D.3d 788, 173 N.Y.S.3d 44 (2nd Dept., 2022). Comparative negligence is a viable defense to a cause of action asserted under either Labor Law §§ 200 or 241(6). See, *Drago v New York City Tr. Auth.*, 227 A.D.2d 372, 642 N.Y.S.2d 83 (2nd Dept., 1996). The conflicting testimony as to whether the plaintiff received specific instructions and training on how to safely descend the stairs safely creates a question of fact regarding the injured plaintiff's potential comparative negligence. Therefore, the part of plaintiff's motion seeking dismissal of the affirmative defense of culpable conduct is denied.

Based on the foregoing, it is hereby

ORDERED, that defendants' motion (Seq. #16) for summary judgment dismissing plaintiff's complaint as to Labor Law §200 is hereby denied, and it is further

ORDERED, that defendants' motion (Seq. #16) for summary judgment dismissing Labor Law 240(1) is hereby granted, and it is further

ORDERED, that plaintiff's motion for summary judgment (Seq. #17) on the issue of Labor Law 240(1) is hereby denied, and it is further

ORDERED, that defendants' motion (Seq. #16) for summary judgment dismissing plaintiff's complaint as to Labor Law 241(6) and Industrial Codes 23-1.4; 23-1.5; 23-1.7(e); 23-1.8(c)(2) and 23-1.2(b)(3) is hereby granted, but DENIED as to Industrial Code 23-1.7(d), and it is further

ORDERED, that plaintiff's motion (Seq. #17) for summary judgment on the issue of liability as to Law 241(6) and Industrial Code 23-1.7(d) is hereby granted, and it is further

ORDERED, that defendants' motion (Seq. #16) for summary judgment on its claims for contractual indemnification and breach of contract against third-party defendant Providence Corp., is hereby denied, and it is further

ORDERED, that Providence's cross-motion (Seq. #18) dismissing the defendants' contractual indemnification and breach of contract claims is granted, and it is further

ORDERED, that the following affirmative defenses are hereby stricken: open and obvious and assumption of risk, and it is further

ORDERED, that the following affirmative defenses are not stricken: lack of creation of defect, lack of actual or constructive notice and no time to remediate or alleviate the unsafe condition, due to triable issues of fact as to whether defendants created or had actual or constructive notice of the alleged dangerous condition, and it is further

ORDERFED, that dismissal of the affirmative defense of culpable conduct is hereby denied.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
November 6, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
2024 NOV 27 AM 9:56