To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN ALFANO and DAWN ALFANO,

Plaintiffs,

-against-

DECISION and ORDER
Seq. 2 & 3
Index No.: 6453/10

LC MAIN, LLC., GEORGE A FULLER COMPANY, INC., F.V.Z. ENTERPRISES, INC., and HRH CONSTRUCTION, LLC,[1]

Defendants.

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CONNOLLY, J.

The following documents were read in connection with defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment:

Defendants' Notice of Motion, Affirmation, Exhibits	1-15
Defendants' Memorandum of Law	16
Plaintiffs' Affirmation in Opposition	17-22
Defendants' Reply	23
Plaintiffs' Notice of Cross-Motion, Affirmation, Affidavits, Exhibits	24-36
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In this action for personal injuries arising out of a construction site accident, the defendants move for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' complaint on the ground that the plaintiffs cannot establish a prima facie case of negligence or violations of Labor Law § § 200, 240 (1), or 241 (6) against the defendants. The plaintiffs oppose the motion and cross-move for an order pursuant to CPLR § 3212 granting them summary judgment on their causes of action based upon violations of Labor Law § § 200 and 241 (6), and common law negligence.

[1] The action as against defendants, F.V.Z. Enterprises, Inc. and HRH Construction has been discontinued, with LC Main, LLC, and George A. Fuller Company, Inc., being the only remaining defendants.

This action was commenced by plaintiffs to recover damages for personal injuries allegedly sustained by the plaintiff, John Alfano, on March 8, 2007 when he slipped and fell on ice in front of an outdoor portable toilet while working as a general foreman for AMX Contracting at a construction site known as Renaissance Square, located at 221 Main Street, White Plains, New York. The defendant, LC Main, LLC ("LC Main"), was the owner of the premises and the defendant, George A. Fuller Company, Inc. ("GAFCO"), was the construction manager for the project. AMX Contracting was plaintiff's employer and the HVAC subcontractor at the site. The Renaissance Square project consisted of the construction of two high-rise tower buildings to contain condominium units, a hotel, restaurant facilities, and commercial retail space.

Plaintiffs allege causes of action for common law negligence and violations of Labor Law § § 200, 240 (1), and 241 (6) predicated on 12 NYCRR § 23-1.7 (d). The defendants move to dismiss the plaintiffs' complaint alleging the defendants cannot be held liable for common law negligence or a violation of Labor Law § 200, as no ice condition existed in the area where plaintiff fell, or alternatively, the defendants had no notice, actual or constructive, of any ice condition, nor did they create the condition. The defendants further allege Labor Law § 240 (1) does not apply because the plaintiff was not subject to a gravity-related risk contemplated by the statute of falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured due to the failure of an enumerated safety device. The defendants allege plaintiffs' Labor Law § 241 (6) claim predicated on 12 NYCRR § 23-1.7 (d) should also be dismissed because the area where plaintiff fell was not in a slippery condition, nor was it a floor, passageway, walkway, scaffold, platform, or other elevated working surface.

Plaintiffs oppose defendants' motion for summary judgment and cross-move for summary judgment on the causes of action based upon common law negligence and a violation of Labor Law § 241 (6), alleging the defendants allowed a dangerous and hazardous slippery snow and ice condition to exist on a passageway on the jobsite, which caused plaintiff to fall, and there is no evidence of comparative negligence by the plaintiff.

For the reasons set forth below, the Court grants defendants' motion for summary judgment dismissing the Labor Law § 240 (1) cause of action, but otherwise denies the defendants' motion and the plaintiffs' cross-motion for summary judgment based upon questions of fact for a jury to determine.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Plaintiffs allege that on March 8, 2007 at approximately 6:30 A.M., the plaintiff, John Alfano, slipped and fell on an icy condition that existed in front of an outdoor portable toilet located in the materials staging area of the westerly portion of the Tower "A" location of the jobsite. The area where plaintiff allegedly fell was on ground level, in a fenced-in area of the construction site exposed to the elements.

To reach the portable toilets, the plaintiff claims he walked from the Tower "A" building, across a driveway, and through the materials staging area on a pathway covered with snow and ice. According to the plaintiff, the pathway that led to the portable toilets ran through the staging area, in between dumpsters and stockpiles of materials, and was approximately 18 inches wide and 25 five feet long. On the date of the accident and for weeks before, the plaintiff noticed there was snow and ice in this area, including on the pathway, and in front of the portable toilets. According to the plaintiff, after using the facility, he exited the portable toilet, took one to two steps, and slipped and fell on ice, causing him to fall to the ground and sustain personal injuries. The plaintiff saw no evidence of sand or salt in the area.

The plaintiff claims that during the winter of 2006-2007, he and his co-workers made numerous complaints to GAFCO representatives, as well as to Total Safety, the project safety consultant, about the lack of sand or salt application on the ice formations located on the project site, including the area where he fell. The plaintiff made these complaints throughout the winter, including days and weeks before his accident.

The defendants deny plaintiffs' allegations regarding the existence of snow and ice around the outdoor portable toilets on the date of the accident, and for weeks prior to that date, and deny receiving any such complaints.

In support of their motion for summary judgment and in opposition to plaintiffs' cross-motion, the defendants submit deposition transcripts and an affidavit from Frank Van Zandt, who was assigned to the project on a daily basis to act as a construction manager. Mr. Van Zandt denies ever observing icy conditions around the portable toilets where plaintiff alleges he fell in the weeks prior to the accident and denies ever receiving any complaints about the condition. To further support their claims, the defendants submit copies of meeting minutes, safety logs, and progress photographs of the jobsite taken on the day before the accident, March 7, 2007.

The defendants submit certified climatological data and an affidavit from Howard Altschule, a forensic meteorologist, to refute plaintiffs' claims. In connection with his analysis, Mr. Altschule relied upon official weather records and climatological data from Westchester County Airport in White Plains, New York, which was four miles away from the accident location, weather station reports from Dobbs Ferry, New York, which was 3.7 miles away, and various weather bulletins and statements issued by the National Weather Service. According to Mr. Altschule, more than three inches of rain fell from March 1-2, 2007. From March 1-6, 2007, no snow or ice was present, but the temperature fluctuated from below freezing to above freezing. On March 7, 2007, the day before the incident, there was a light snowfall with an accumulation of 1/4", with the air temperature remaining below freezing the entire day. On March 8, 2007, no precipitation fell, but the air temperature remained below freezing until sometime after plaintiff's accident. At the time of the accident, approximately 1/4" or less of snow would have been present on the ground. After the accident, from March 15-17, 2007, a snowstorm left an accumulation of 6.8 inches of snow on the ground. Mr. Altschule reviewed plaintiffs' photographs and opines that they would not be an

accurate depiction of the area on the date of the accident, but they appeared to be consistent with conditions after the March 15-17, 2007 snowfall.

The defendants also submit an affidavit from Michael Nelson, a forensic computer examiner who performed a forensic analysis of the metadata associated with plaintiffs' photographs, and who concludes plaintiffs' photographs were taken 12 days post-accident. The defendants claim the photographs were taken after the March 15-17, 2007 snowstorm, and therefore, do not accurately depict the scene of the accident as it appeared at the time of the accident, as plaintiff claims.

In opposition to the defendants' motion and in support of plaintiffs' cross-motion for summary judgment, plaintiffs submit an affidavit from John Alfano and affidavits from four co-workers, one of whom was an eyewitness to plaintiff's fall. All of the co-workers confirm plaintiff's description of the snow and ice condition in the area where he fell on the date of the accident, as well as during the winter of 2006-2007, and the lack of sand or salt. The co-workers also state that they complained to GAFCO and Total Safety about the lack of sand or salt application on the ice formations in the days and weeks before the accident.

Plaintiffs also submit photographs of the accident scene taken several days after the accident, which they claim depict the area where the accident occurred and the snow and ice conditions as they existed at the time of the accident. Plaintiffs refute the conclusion of defendants' computer forensic examiner about the date the photographs were taken by submitting an affidavit from plaintiff, John Alfano, who states he never formatted the correct time and date on the camera used to take the photographs and therefore, the conclusions made by defendants' forensic computer expert are flawed.

The plaintiffs also point out that the progress photographs relied upon by defendants to establish no snow or ice conditions existed on the jobsite are not an accurate depiction of the conditions as they existed at the time and location of plaintiff's accident, as the photographs consist of aerial and profile shots of the tower under construction and not the area where the accident occurred.

The plaintiffs also question the accuracy of the conclusions made by defendants' meteorological expert, as he has no personal knowledge of the conditions that existed at the time and place of the accident and the reports he relies upon were based on conditions existing at weather stations about four miles from the jobsite. Plaintiffs also point out that defendants' expert confirms the conditions remained below freezing for days before the accident and that it snowed 1/4" the day before.

LEGAL ANALYSIS/DISCUSSION

Summary Judgment Standard

"[T]he proponent of a summary judgment motion 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" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *(Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hospital*, 68 NY2d at 324). The papers submitted in support of and in opposition to a motion for summary judgment must be examined in a light most favorable to the party opposing the motion and the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1979]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

"Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied" (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). "Moreover, the burden on the court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (*id*.). "It is the existence of an issue, not its relative strength that is the critical and controlling consideration" (*Liang v Vanegas*, 2011 WL 6131093, 2011 Slip Op 33127 [U] [Sup Ct NY Co, 2011], *citing Barrett v Jacobs, 255 NY 520 [1931]; Cross v Cross*, 112 AD2d 62, 64 [1st Dept 1985).

Labor Law § 200 and Common Law Negligence

"Labor Law § 200 codifies the common-law duty imposed upon an owner or contractor to maintain a safe construction site" (*Aragona v State of New York*, 74 AD3d 1260 [2d Dept 2010]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "Liability for a violation of Labor Law § 200 and common-law negligence may be imposed upon a property owner where . . . the claimant's injuries arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, when the owner had actual or constructive notice of the dangerous condition" (*Aragona v State of New York*, 74 AD3d at1260-1261). Since the plaintiffs' claims relate to a dangerous condition at the worksite and not to the manner in which the work was performed, the issue is whether the defendants created the allegedly dangerous condition or had actual or constructive notice thereof (*see Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 934 [2d Dept 2012]).

Both the defendants' motion and the plaintiffs' cross-motion for summary judgment on the Labor Law § 200 and common law negligence claims are denied, as questions of fact exist as to whether there was snow and ice in front of the portable toilet at the time of plaintiff's accident and whether the defendants had actual or constructive notice of the alleged condition and failed to take remedial action. Both parties submit sufficient proof in support of their positions to create sharp issues of fact.

Moreover, issues of fact exist as to whether the plaintiff was comparatively negligent and, if so, to what extent. The plaintiff and his co-workers claim the icy conditions existed in the materials staging area and around the portable toilets for weeks before the accident. This was an area apparently well used by workers on the site, including the plaintiff, without any incident until the date the plaintiff claims he fell. Questions of fact remain as to whether the plaintiff failed to proceed with reasonable care under the conditions then and there existing, particularly since he testified he was well aware of the icy condition he claims existed. The Court cannot conclude under the facts presented here that the plaintiff was free from negligence as a matter of law, as plaintiffs suggest.

Based upon the conflicting evidence submitted on the motions, including the credibility of the lay and expert witnesses, and because the Court's function on a summary judgment application is not issue determination, but issue finding, the motion and cross-motion for summary judgment on the Labor Law § 200 and common law negligence claims are denied.

Labor Law § 240 (1)

"Labor Law § 240 requires contractors and property owners, engaged in, among other things, the construction, demolition, or repair of buildings or structures, to furnish or erect scaffolding, ladders, pulleys, ropes, and other safety devices, which must be constructed, placed, or operated as to give proper protection for workers (see Labor Law § 240 [1]). The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices" (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]). The special hazards encompassed by the statute are limited to such gravity-related risks as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured due to the failure of an enumerated safety device *(Ross v. Curtis-Palmer Hydro-Electric,* 81 NY2d 494 [1993]; *see also Peay v. New York City School Construction Authority*, 35 AD3d 566 [2d Dept 2006]*; Natale v. City of New York*, 33 AD3d 772 [2d Dept 2006].)

Since it is undisputed that plaintiff fell at ground level and an elevation-related risk was not implicated, the defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) claim against them.

Labor Law § 241 (6)

"Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers . . . In order to recover

damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards" (*Aragona v State of New York*, 74 AD3d 1260, 1261 [2d Dept 2010], *citing Hricus v Aurora Contractors Inc*., 63 AD3d 1004, 1005 [2d Dept 2009]). Here, the plaintiffs allege the defendants violated 12 NYCRR § 23-1.7 (d) which provides:

> "Slipping Hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform, or other elevated working surface which is in a slippery condition. Ice, snow, water, grease, and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

This regulation applies to slipping hazards and requires an employer to remove, sand, or cover, snow, ice, or other foreign substances that may cause slippery footing on a floor, passageway, walkway, or other specifically identified surfaces. "Responsibility under Labor Law § 241(6) 'extends not only to the point where the . . . work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work" (*Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000], *citing Sergio v Benjolo*, *N.V*., 168 AD2d 235, 236 [1st Dept 1990]).

The defendants argue New York State Industrial Code § 23-1.7 (d) is inapplicable to the facts of this case since plaintiff's accident occurred in an open common area of the construction site and not on a passageway or walkway as required to trigger application of this regulation (*see Roberts v Worth Construction, Inc*., 21 AD3d 1074, 1077 [2d Dept 2005]; *Morra v White*, 276 AD2d 536, 537 [2d Dept 2000]). However, the plaintiff's photographs depicting the area where the accident occurred show a dedicated path through a fenced-in materials staging area of the jobsite leading directly to the portable toilets installed for the workers to use. The pathway is demarcated on one side by dumpsters and on the other side by stockpiles of construction materials, and is clearly defined by the physical borders of these objects. Moreover, the plaintiff was utilizing the area as a pathway at the time his accident occurred.

Because this was a demarcated pathway in an enclosed area of the jobsite used by workers to access materials as well as the portable toilets, and the plaintiff was using it as such at the time of the accident, it is considered a passageway or walkway as contemplated by 12 NYCRR § 23-1.7 (d) (*see Brady v Tiago Holdings, LLC*., 2011 NY Slip Op 32200[U] [Sup Ct, NY County 2011].) Based upon the applicability of 12 NYCRR § 23-1.7 (d) to the facts of this case, the defendants' motion to dismiss the Labor Law § 241 (6) claim is denied.

The plaintiffs' cross-motion for summary judgment on the Labor Law § 241 (6) claim based upon a violation of 12 NYCRR § 23-1.7 (d) is also denied. Although 12 NYCRR § 23-1.7 (d) applies to the facts as alleged by the plaintiffs, they have not established a violation of the regulation as a matter of law, as an issue of fact exists as to whether a slippery condition caused by ice actually existed in front of the portable toilet on the date of the accident.

Moreover, a violation of Labor Law § 241 (6) is "merely some evidence of negligence which the jury may consider on the question of defendant's negligence" (*Rizzuto v L.A. Wenger Contracting Co., Inc*., 91 NY2d 343, 349 [1998]; citing *Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). "An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id*. at 350). Since issues of fact also exist regarding plaintiff's comparative negligence, the cross-motion is denied in its entirety (*see Edwards v C & D Unlimited, Inc*., 295 AD2d 310, 311 [2d Dept 2002]; *Harinarain v Walker*, 73 AD3d 701, 702 [2d Dept 2010]).

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' cause of action based upon Labor Law § 200 and common law negligence is denied; and it is further

ORDERED, that defendants' motion pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' cause of action based upon Labor Law § 240 (1) is granted; and it is further

ORDERED, that defendants' motion pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' cause of action based upon Labor Law § 241 (6) is denied; and it is further

ORDERED, that plaintiffs' cross-motion pursuant to CPLR § 3212 granting them summary judgment on their cause of action based upon common law negligence, and to the extent it was based upon Labor Law § 200, is denied; and it is further

ORDERED, that plaintiffs' cross-motion pursuant to CPLR § 3212 granting them summary judgment based upon Labor Law § 241 (6) is denied; and it is further

ORDERED, that the parties shall appear in the Settlement Conference Part on April 11, 2013 at 9:30 A.M. in Courtroom 1600 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York.

All other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
March 18, 2013

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