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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. *Justice* PART 8

Luigi Scaccia And Giuseppina Scaccia,

- v -

1251 Americas Associates II, LP et al.,

INDEX NO. 104170/07

MOTION DATE 1/14/11

MOTION SEQ. NO. 005

MOTION CAL. NO. ____

The following papers, numbered 1 to 22 were read on this motion ~~to~~/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-17
Answering Affidavits — Exhibits	18-21
Replying Affidavits	22

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: Feb 28, 2011

JOAN M. KENNEY J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------X

LUIGI SCACCHI and GIUSEPPINA SCACCHI,

Plaintiffs,

-against-

1251 AMERICAS ASSOCIATES II, L.P., MFD 1251 AMERICAS II CORPORATION, MITSUI FUDOSAN AMERICA, INC. and SWEET CONSTRUCTION CORP.,

Defendants.

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DECISION AND ORDER
Index №.: 104170/07
Motion Seq. No. 005

JOAN M. KENNEY, J.S.C.:

In an action involving a laborer who slipped on ice in an outdoor plaza, defendants 1251 Americas Associates II, L.P. (1251 Americas), MFD 1251 Americas II Corporation (MFD), Mitsui Fudosan America, Inc. (Mitsui), and Sweet Construction Corp. (Sweet) move collectively, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

FACTUAL BACKGROUND

Briefly, on December 5, 2005, plaintiff Luigi Scacchi (Scacchi) was working for non-party Malatesta-Paladino on a renovation project for an outdoor plaza abutting the Exxon Building, which is located at 1251 Avenue of the Americas, in Manhattan. Scacchi testified that, while walking toward a pipe he intended to pick up, he slipped and fell on ice, injuring his hand, wrist, and back (Scacchi Deposition, at 98-110).

1251 Americas owns the property where plaintiff was injured, while MFD and Mitsui each have an ownership interest in 1251 Americas; Sweet was the general contractor of the renovation

project. Plaintiffs claim that defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law § 240 (1), and Labor Law § 241 (6). Scacchi's wife, Giuseppina, alleges that the accident deprived her of her husband's care, comfort, and society, and that she is thus entitled to damages from defendants for loss of consortium.

ARGUMENTS & DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Preliminarily, the court addresses defendants' argument that the complaint should be dismissed because there is no evidence that defendants owned the subject property or operated as contractors. As to Sweet, plaintiffs establish that it was the general contractor on the project by submitting the general contracting agreement between Sweet and 1251 Americas. Plaintiffs establish ownership as to 1251 Americas by submitting defendants' response to

plaintiffs' notice to admit, in which defendants admit that 1251 Americas owned the subject property on the date of the accident. Finally, plaintiffs suggest that MFD and Mitsui are owners of the subject property by offering proof that the two companies hold an ownership interest in 1251 Americas. As this is not the same as establishing an ownership interest in the subject property, defendants are correct that MFD and Mitsui are entitled to dismissal of the complaint as against them.

Labor Law § 240 (1)

Labor Law § 240 (1), entitled "Scaffolding and other devices for use of employees," provides:

> All contractors and owners and their agents ... 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.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]).

A plaintiff is not entitled to the protections of this section unless his injuries "were the direct consequence of a failure to

provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The First Department has held that a 12-inch ramp does not present an elevation hazard sufficient to invoke the protections of Labor Law § 240 (1) (*DeStefano v Amtad N.Y.*, 269 AD2d 229, 229 [1st Dept 2000]). Nor does the distance traveled in a slip to the ground, even one caused by ice or snow, constitute a significant elevation difference (*see Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 59 [1st Dept 2004]).

Defendants argue that plaintiffs fail to allege a significant elevation difference, submitting Scacchi's deposition testimony, which shows that he fell to the ground on which he was walking (Scacchi Deposition, at 80-81). In opposition, plaintiffs do not argue that Scacchi faced a significant elevation differential at the time of his fall. As such, the branch of defendants' motion which seeks dismissal of plaintiffs' Labor Law § 240 (1) claim must be granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> All areas in which construction ... work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The duty imposed on owners and contractors by this section is

nondelegable and it exists even in the absence of control or supervision of the work site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]).

To support a claim under section 241 (6), plaintiffs must allege a violation of an applicable Industrial Code regulation which "mandate[s] compliance with concrete specifications and [does] not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009] [internal citation omitted]). Violation of the regulation must also be the proximate cause of the plaintiff's injury (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Plaintiffs allege that defendants violated 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2). Defendants do not contend that either of these regulations is insufficiently concrete or specific, but instead argue that both are inapplicable to the circumstances of Scacchi's accident.

12 NYCRR 23-1.7 (e) (Tripping and other hazards), subsection (2) provides that "[t]he 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 this regulation is inapplicable on its

face, as Scacchi slipped on ice, rather than on accumulations of dirt and debris, scattered tools and materials, or a sharp projection. Plaintiffs argue that the ice that Scacchi slipped on was debris left behind from Sweet's efforts to clear ice and snow from the plaza on the morning of the accident.

Courts have limited the application of 12 NYCRR 23-1.7 (e) (2) to the obstructions listed in the regulation (*see Romeo v Property Owner (USA) LLC*, 61 AD3d 491 [1st Dept 2009] [12 NYCRR 23-1.7 (e) (2) inapplicable where a tile dislodged beneath a worker's foot]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [12 NYCRR 23-1.7 (e) (2) inapplicable where a worker slipped on a bolt protruding from a concrete slab]).

Here, Scacchi slipped on ice; he did not trip, the hazard that 12 NYCRR 23-1.7 (e) (2) seeks to protect against. Moreover, the ice Scacchi slipped on is plainly not debris, or any of the other obstructions listed by this regulation. Thus, 12 NYCRR 23-1.7 (e) (2) may not serve as a predicate to a Labor Law § 241 (6) violation in this case.

12 NYCRR 23-1.7 (d) (Slipping hazards) provides:

> 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.

Defendants argue that this regulation is inapplicable because the plaza area where Scacchi was working at the time of his

accident is an open area, rather than a "floor, passageway, walkway, scaffold, platform or other elevated working surface" (*id.*). In support, defendants submit the deposition testimony of Rand Gartman (Gartman), Sweet's superintendent on the project, who testified that the outdoor plaza consisted of more than 5,000 feet of open space (Gartman Deposition, at 17).

Plaintiffs contend that the case of *Rizzuto v L.A. Wenger Contr. Co.* (91 NY2d 343, *supra*), in which the Court of Appeals found 12 NYCRR 23-1.7 (d) to be applicable, is directly on point and compels a conclusion that the regulation is applicable to Scacchi's accident, but fail to substantiate this conclusion.

12 NYCRR 23-1.7 (d) does not apply where the work takes place in an "open area" (*see O'Gara v Humphreys & Harding*, 282 AD2d 209, 209 [1st Dept 2001] ["muddy ground in an open area exposed to the elements" outside the purview of 12 NYCRR 23-1.7 (d)]; *Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998] [12 NYCRR 23-1.7 (d) inapplicable to open area between high-rises under construction]; *Scarupa v Lockport Energy Assoc.*, 245 AD2d 1038, 138-139 [4th Dept 1997] [12 NYCRR 23-1.7 (d) inapplicable as muddy ground at a cogeneration plant was an open area]); *see also Roell v Velez Organization*, 2010 WL 1733471, 2010 NY Misc LEXIS 1862 [Sup Ct, NY County 2010] [12 NYCRR 23-1.7 (d) inapplicable as metal deck placed on steel before a concrete pour was an open area]).

Here, defendants rest their contention that the outdoor plaza

where Scacchi slipped was an open area on Gartman's testimony that the plaza consisted of several thousand feet. As this evidence is uncontroverted, 12 NYCRR 23-1.7 (d) is not applicable, and the branch of defendants' motion which seeks dismissal of plaintiffs' Labor Law § 241 (6) claims must be granted.

Labor Law § 200 and Common-Law Negligence

Section 200 of the Labor Law "codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

"[W]here a plaintiff's injuries stem from a dangerous condition on the premises, a [defendant] may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [internal quotation marks and citation omitted]). Moreover, where an accident is caused by a dangerous condition on the premises, rather than by the manner in which the work was performed, "whether defendants supervised or controlled plaintiff's work is irrelevant" (*Piazza v Shaw Contract Flooring Servs., Inc.*, 39 AD3d 1218, 1219 [1st Dept 2007] [internal citation omitted]). Finally, where a defendant creates the subject defect, the issues of control and notice are irrelevant (*Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]).

Defendants argue that there is no evidence that any defendant created the defect, or had notice of the icy condition. Plaintiffs do not allege that 1251 Americas created the defect, or had notice of it. Thus, plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed as against 1251 Americas.

As to whether Sweet had notice of the icy condition, defendants submit the deposition testimony of Sweet's superintendent, Gartman, who stated that he didn't know anything about Scacchi's accident, and that he had no recollection of what the conditions were like at the renovation project on the day of the accident (Gartman Deposition, at 33-34).

Gartman acknowledged, however, that it was Sweet's responsibility to clear snow and ice from the job site and testified that his daily log from the project indicates that on December 5, 2005, it was cold and cloudy, with a temperature between 30 and 36 degrees Fahrenheit, and that Sweet cleared snow from the site to prepare for the scheduled concrete pour (Gartman Deposition, at 15-17, 21-22).

Plaintiffs argue, referring to the deposition testimony of Gartman and Scacchi, that Sweet had control of the work site and knew, or should have known, of the icy condition on which Scacchi slipped.

Here, plaintiff's accident allegedly arose from a defect on the premises, a patch of ice on the plaza. Gartman's testimony

shows that Sweet had control over the work site, and Scacchi's testimony raises a material issue of fact as to whether Sweet had constructive notice of the icy condition. Scacchi testified that the work site was icy when he arrived, several hours before his accident (Scacchi Deposition, at 44). A reasonable jury could decide that this was enough time for Sweet's employees to discover and remedy the icy condition (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). As such, Sweet is not entitled to summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims. Accordingly, it is

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 240 (1) and Labor Law § 241 (6) claims is granted; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against defendant Sweet Construction Corp. is denied; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against defendants 1251 Americas Associates II, L.P., MFD 1251 Americas II Corporation, Mitsui Fudosan America, Inc. is granted; and it is further

ORDERED that the motion of defendants MFD 1251 Americas II

Corporation and Mitsui Fudosan America, Inc. to dismiss the complaint herein as against them is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that plaintiffs file their note of issue no later than March 21, 2011, if not already filed and proceed to trial, forthwith.

Dated: Feb. 28, 2011

ENTER:

Hon. JOAN M. KENNEY, J.S.C.

FILED

MAR 03 2011

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COUNTY CLERK'S OFFICE