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

PRESENT: HAROLD B. BEELER PART 9

Justice

0121340/2000

GAISOR, FRANK
vs
GREGORY/MADISON

SEQ 1

SUMMARY JUDGMENT

INDEX NO. 121340/2000

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is granted and the complaint dismissed in accordance with the annexed memorandum decision of today's date.

Dated: 5/16/03

Harold B. Beeler
HAROLD B. BEELER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 16th of May, 2003.

PRESENT: HON. HAROLD B. BEELER

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FRANK GAISOR,

Plaintiff,

-against-

GREGORYMADISON AVENUE, LLC, and TURNER CONSTRUCTION COMPANY,

Defendants.

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DECISION/ORDER

Index No. 121340/00

Motion Seq. 001

Defendants GREGORYMADISON AVENUE, LLC ("Gregory") and TURNER CONSTRUCTION COMPANY ("Turner") (collectively "defendants") move for summary judgment pursuant to CPLR Rule **3212** dismissing plaintiffs claims under Labor Law §§ 200, 240(1) and 241(6). Plaintiff opposes granting defendants summary judgment only with regard to its Labor Law § 241(6) claim.

Plaintiff, a journeyman ironworker for non-party subcontractor DCM Erectors ("DCM"), was allegedly injured on Sunday, February 20, 2000 at a construction site located at 383 Madison Avenue in New York County (the "premises"). Gregory was the lessee of a ninety-nine (99) year ground lease for the premises. Turner was the general contractor on the site. Non-

parties ADF Steel ("ADF"), a subcontractor of Turner, and DCM, a subcontractor of ADF, were brought into the project to perform ironwork.

On February 20,2000, plaintiff reported to work at approximately 7:00 am. There was snow and ice in the work area and DCM foreman Joseph Alba ("Alba") instructed plaintiff how to clean the snow and ice off the floor and structural steel by using air hoses, ice scrapers, and brooms provided by DCM and then directed plaintiff to perform this work. After a few minutes of attempting to remove ice from equipment with an ice scraper, plaintiff was allegedly injured when he slipped on ice and fell.

Turner's contract with ADF (the "contract") provided that it was the subcontractors' responsibility to remove snow and ice from equipment, material, and the site; to provide safe working conditions, equipment and proper supervision for its employees; and to supply all safety equipment, including hard hats and water protective gear, required to perform the work of the subcontractors. Plaintiff testified at his deposition that it was the general practice of DCM to remove ice and snow from equipment, material, and the site. Carl Schnee ("Schnee"), safety liaison for interior projects for Turner, testified at his deposition that no Turner laborers were present at the site on the day of plaintiffs accident because February 20,2000 was a Sunday and Turner laborers do not work on Sundays and that the only contractors who would have handled snow or ice removal from the site was ADF and DCM. Schnee's review of his "Daily Construction Report" from the date of plaintiffs accident further corroborated that no Turner laborers were working at the site on February 20,2000.

Defendants argue, and plaintiff does not dispute, that plaintiff cannot establish a claim under Labor Law § 240(1) because plaintiff was not injured as a result of an elevation-related

hazard. It is well settled that in order to establish a Labor Law § 240(1) claim against defendants, plaintiff must proffer evidence that defendants failed to properly protect workers employed on the construction site from elevation-related hazards. *Misseritti v Mark IV Construction Co.*, 86 NY2d 487 (1995). As there is no evidence in this case of any elevation-related hazard involved in plaintiff s injury, plaintiff s cause of action under Labor Law $ 240(1) must fail.

Defendants further argue, and plaintiff does not dispute, that they are entitled to a dismissal of plaintiffs claims under Labor Law § 200 because defendants did not supervise or control DCM in their efforts to remove snow and ice the day of plaintiffs accident or, alternatively, because the snow and ice is an open and obvious condition. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Comes* v *New York State Electric and Gas Corporation*, 82 NY2d 876. A pre-condition to this duty is that the party charged with such responsibility have the authority to control the activity bringing about the injury. *Id.* Thus, where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200. *Id.; Lally v JGN Construction Corp.*, 295 AD2d 148 (1st Dep't 2002).

Alternatively, the duty imposed under Labor Law § 200 does not extend to situations where the danger at issue is open and obvious. *Gottlieb v Park Avenue Offices, Inc.*, 13 AD2d 645 (1st Dep't 1961); *Doyne v. Barry, Bette & Led Duke Inc.*, 246 AD2d 756 (3d Dep't 1998). **As** plaintiff was aware of the presence of the snow and ice -- in fact, it was his job at the moment

to eradicate it -- the court concludes that plaintiff was confronted with a readily observable danger and hence, no liability under Labor Law § 200 should attach. Even assuming *arguendo* that the hazard in question was not readily observable, plaintiffs claims in this regard still would be subject to dismissal, as the record reveals that neither defendant exercised any control or supervision over the injury-producing work.

Finally, defendants argue that plaintiff cannot establish a cause of action against defendants under Labor Law § 241(6), based on alleged violations of 12 NYCRR 23-1.7, 23-1.8(c)(2), 23-21 and 23-1(c)(2). Labor Law § 241(6) imposes a non-delegable 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 LA Wenger Contracting,* 91 NY2d 343 (1998). To establish a prima facie claim under Labor Law § 241(6), plaintiff must show that defendants violated a specific rule or regulation of the Commissioner of Labor mandating compliance with concrete specifications. *Id.* Defendants move for summary judgment with regard to each of the above code provisions, however, plaintiff opposes only with regard to 12 NYCRR 23-1.8(c)(2).

12 NYCRR 23-1.7 provides, in part, that any foreign substance which may cause slippery footing, including ice and snow, shall be removed, sanded or covered to provide safe footing. Defendant argues, and the court agrees, that this regulation does not apply to this case since the object on which plaintiff injured himself -- ice -- was an integral part of the work he was performing -- removal of ice and snow. *Harvey v Morse Diesel International, Inc.,* 299 AD2d 451 (2d Dep't 2002); *Alvia v Teman Electrical Contracting, Inc.,* 287 AD2d 421 (2d

Dep't 2001). Indeed, defendants could not have provided plaintiff with a work place that was safe from the defect that his employer was engaged to eliminate. *Brugnano* v *Merrill Lynch & Co., Inc.,* 216 AD2d 18 (1st Dep't 1995).

The court does not consider the potential merit of plaintiffs claim under 12 NYCRR 23-1.8(c)(2) since this section first appeared in plaintiffs supplemental bill of particulars which were served on defendants after the note of issue was filed without leave of court. Failure to seek leave to file an amended bill of particulars after the note of issue has been filed renders the amended bill of particulars a nullity. *Elkrichi* v *Flushing Hospital Medical Care,* 741 NYS2d 420 (2d Dep't 2002); *Bartkus* v *New York Methodist Hospital,* 742 NYS2d 554 (2d Dept. 2002).[1]

Finally, the court agrees with defendants that 12 NYCRR 23-21 which deals with maintenance and housekeeping issues is inapplicable to the facts of this case and that 12 NYCRR 23-1(c)(2) does not exist.

WHEREFORE it is

ORDERED that defendants' motion for summary judgment dismissing plaintiffs causes of action to recover damages for common-law negligence pursuant to Labor Law § 200, pursuant to Labor Law § 241(6) based upon alleged violations of 12 NYCRR 23-1.7, 23-1.8(c)(2), 23-21, and 23-1(c)(2), and pursuant to Labor Law §240(1) are granted and the complaint is dismissed in

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[1] Although the Appellate Division has not yet passed on whether 12 NYCRR 23-1.8(c)(2) entitled *Foot* Protection, which falls under the heading "Protective Apparel", is a specific regulation, the Third Department ruled that 12 NYCRR 23-1.8(c)(1) entitled *Head* Protection is a general regulation which cannot support a cause of action under Labor law §241(6). See, *Sajta* v *Latham Four Partnership,* 282 AD2d 969 (3d Dep't 2001).

its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: May 16,2003

ENTER:

HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.