[* 1]

EMILY JANE GOODMAN

ORK — NEW YORK COUNTY

PART 17

Index Number : 101570/2005

GERMAIN, DANIEL

VS.

HEARST COMMUNICATIONS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 And Cross Motion are decided per attached

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/5/07

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

DANIEL GERMAIN and JUDITH GERMAIN,

Plaintiffs,

-against-

Index No. 101570/05

HEARST COMMUNICATIONS, INC., TISHMAN SPEYER ASSOCIATES, L.P., TURNER CONSTRUCTION COMPANY, SORBARA CONSTRUCTION CORP. and COMPONENT ASSEMBLY SYSTEMS, INC.,

Defendants.

----------X

Emily Jane Goodman, J.S.C.:

In this action arising out of a construction site accident, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.[1] Plaintiffs cross-move, pursuant to CPLR 3025 (b), to amend their bill of particulars, and to withdraw their Labor Law § 240 (1) claim.

BACKGROUND

At the time of his accident, plaintiff Daniel Germain (plaintiff) was an ironworker foreman employed by non-party subcontractor Tower Installations (Tower) at The Hearst Building located at 959 Eighth Avenue in Manhattan. Defendant Hearst Communications, Inc. (Hearst) owned the property, and hired

[1]No arguments with respect to defendant Tishman Speyer Associates, L.P. have been propounded on these motions. This failure precludes a grant of summary judgment in this defendant's favor.

defendant Turner Construction Company (Turner) to be the general contractor for a project which would erect a high-rise tower atop the then-existing structure. Turner retained defendant Sorbara Construction Corp. (Sorbara) as the concrete subcontractor, whose duties included installing rebar; Component Assembly Systems, Inc. (Component) to provide carpentry services; and Tower to install the curtain wall.

On the day of his accident, January 27, 2005, plaintiff was leaving the third floor to go to the second floor, where the Tower shanty was. In order to go from the third floor to the second, plaintiff had to descend a flight of steps, identified as north stairway #3 (the stairs). The north area of the third floor was exposed to the elements, as it was to become part of the main lobby which would eventually rise 75-80 feet above, with an extended façade and a horizontal skylight. Immediately before the stairs was an area of exposed rebar that had been laid preparatory to a concrete pour. The rebar consisted of a grid of five-inch by five-inch squares, and a picture taken soon after the accident, on the same day, shows that snow had fallen on the area at some point prior to plaintiff's accident. According to plaintiffs' amended complaint, plaintiff "was caused to trip and fall over rebar, dirt, snow, ice and other refuse" (Amended Complaint, ¶ NINETEENTH), and he fell down approximately 10 cement steps to the landing below, sustaining injuries.

Plaintiffs' amended complaint asserts one cause of action, sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The Labor Law § 240 (1) claim has been withdrawn.

DISCUSSION

Plaintiffs' Cross Motion

In plaintiffs' prior bills of particulars, plaintiffs alleged that "plaintiff slipped and tripped on rebar, dirt and other matter" (6/21/05 Bill of Particulars, ¶ 6; 5/8/06 Amended Bill of Particulars, ¶ 6). Paragraph 9 of these prior bills of particulars further alleged that defendants "failed to ensure the job site was free of tripping hazards; ... failed to ensure the job site was free of loose debris and materials that cause tripping and slipping hazards; ... [and] failed to ensure that sufficient laborers were at the job site to clean up the dirt, debris and other refuse ... ."

Plaintiffs seek to amend their bill of particulars, paragraph 9, to include the following:

> [plaintiff] was caused to trip and fall over rebar, dirt, snow, ice and other refuse ...; ... defendants failed to ensure the job site was free of snow, ice, loose debris and materials that cause tripping and slipping hazards; ... defendants failed to remove snow and ice from the landing and stairway and failed to cover said landing and stairway

> with _____[2]; ... defendants failed to ensure that sufficient laborers were at the job site to clean up the dirt, debris, snow and ice and other refuse from said landing and stairway; [and] defendants further failed to cover and/or protect the same landing and stairway from falling snow and freezing ice; ... .

Plaintiffs seek to amend their bill of particulars "to conform [it to] their amended complaint" (Konstadt 1/30/07 Affirm., ¶ 56), specifically referring to paragraph NINETEENTH, quoted before in this decision. Plaintiffs aver that defendants would be neither surprised nor prejudiced by the amendment because defendants all had full access to all the discovery had in this matter, including the date-stamped photo taken of the accident site shortly after plaintiff fell which was shown to all those who were deposed. In addition, in his affidavit, sworn to January 26, 2007, plaintiff attests that his "foot slipped off the top of the rebar and it went into one of the pockets or squares of the rebar causing me to trip and fall forward" (unnumbered third page). His co-worker, Gerard McNulty, testified in his affidavit that plaintiff "slipped and tripped on the rebar at the very top of the staircase"; that "[t]here are accumulations of snow and ice in the rebar squares" (referring to the date-stamped photo of the accident site); and that the "top

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[2]Some portion of the text appears to be missing here; "and stairway with" are the last words on one page, and the first word on the next is "stairway."

of the rebar on which we were walking was slippery" (McNulty 1/29/07 Aff., ¶¶ 3, 4, 5). Plaintiffs maintain that the proposed amendments will not change their theory of liability.

Defendants contend that plaintiff's affidavit contradicts his much earlier deposition, maintaining that at his deposition, plaintiff had said that he was not sure if ice and snow had accumulated on the exposed rebar, and that he could not say with certainty what had caused his fall. According to defendants, plaintiff never said in his deposition that his accident was due to rebar that was slippery from snow and ice.

However, defendants' contention makes too fine a distinction between plaintiff's testimony in his deposition and in his affidavit. There is no discrepancy. On page 33 of his deposition, plaintiff attested that he slipped off/in the rebar; that it was cold, and that there might have been ice on the rebar, but he was not sure; that it was a "pretty messy area at the time [with] snow and debris and stuff." On page 38, the issue of the presence of ice and snow was raised again when he testified that he did not think that there was sand or salt for traction against the snow hazard. Plaintiff did not know "exactly" if snow or ice was on the rebar, "but it was definitely in the general area" (Plaintiff's Depo., at 95). Plaintiff's affidavit is not to the contrary. Rather, he attests that snow and ice covered the entrance area to the stairs and that the

date-stamped photo showed the conditions there at the time of the accident, i.e., that there was snow and ice in and about the rebar grids. As in his deposition, plaintiff testified that his foot slipped off the top of the rebar and went into one of the pockets of the rebar, causing him to trip and fall forward, down the stairs.

"CPLR 3025 (b) provides that leave to amend pleadings shall be freely given, and this rule has been applied to the amendment of bills of particulars as well, in the absence of prejudice or surprise" (*Katechis v Our Lady of Mercy Medical Center*, 36 AD3d 514, 516 [1st Dept 2007]). The motion is addressed to the sound discretion of the court (*Smith v Hercules Construction Corp.*, 274 AD2d 467, 468 [2d Dept 2000]). The motion may be granted after the note of issue has been filed "provided that the plaintiffs make a showing of merit and that the amendment involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants [internal quotation marks and citation omitted]" (*Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007]).

Here, plaintiffs made their cross motion to amend four months after filing the note of issue and certificate of readiness. Such a period of time is not so lengthy as to constitute laches. Plaintiffs have made a showing of the merit of the proposed amendment. Moreover, no new theory of liability

would be raised by the amendment. By referencing the evidence that indicates that the snow/ice condition of the accident area had been an issue that had been addressed by the parties, plaintiffs have also shown that defendants will not be prejudiced by the granting of the cross motion. Therefore, the cross motion to amend the bill of particulars is granted, in the form attached to plaintiffs' moving papers. That part of the cross motion which seeks to withdraw plaintiffs' Labor Law § 240 (1) claim is also granted.

Defendants' Motion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*,

68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Labor Law § 200 and Common-Law Negligence

Defendants seek summary judgment on the Labor Law § 200 and negligence claims based on the argument that they did not direct or control plaintiff's work. However, in their moving papers, defendants make no argument that they had no actual or constructive notice of the alleged hazardous condition. In opposition to defendants' motion, plaintiffs do not address defendants' argument regarding direction or control, but explain that their claims are based on defendants' actual or constructive knowledge of the condition, within sufficient time to remedy it, and their failure to do so. It is not until defendants' affirmation in reply that defendants argue, in a paragraph, that "the rebar was not installed more than a day or so prior to the accident" and that plaintiff "was unsure as to whether or not ice and/or snow had accumulated on the rebar thereby creating a hazardous condition" (Sparling 2/21/07 Reply Affirm., ¶ 14).

"It is settled that § 200 of the Labor Law 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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). When an injury occurs as a result of a dangerous condition, rather than as the result of a contractor's method of doing the work, "[t]he statute applies ... to owners and contractors who either created a dangerous condition or had actual or constructive notice of it" (*Linares v United Management Corp.*, 16 AD3d 382, 384 [2d Dept 2005]; *see also Dowd v City of New York*, 40 AD3d at 910; *Public Administrator of Kings County v 8 B.W., LLC*, 40 AD3d 834, 835 [2d Dept 2007]). In order to establish a defendant's notice, a dangerous condition must be "visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims must be denied because the evidence raises multiple questions of fact that must await the trier of fact for resolution. Turner's witness, Will Whitesell, testified that it had snowed one or two days before the accident (Whitesell Depo., at 41-42), yet Turner's daily construction logs show that it snowed five days before, on January 22, 2005. Whitesell recalled that Sorbara had installed the rebar either that morning or the day before the accident (*id.* at 42), but

Sorbara's witness, Albert DeRoss, testified that the rebar in the photo looked like it had been sitting there for a long time, waiting for something else to be ready (DeRoss Depo., at 27). DeRoss contends that Turner knew when the rebar was installed because he would have told Turner about it (*id.* at 32), yet neither Turner nor Sorbara's daily work logs, spanning from December 27, 2004 through January 27, 2005, indicates when Sorbara installed the rebar in the area of plaintiff's accident. DeRoss stated that if the area had been ready for concrete, it would have been poured the day after the rebar was installed (*id.* at 27-28), but that the area was not ready for a concrete pour because it was filled with snow (*id.* at 19). However, he also testified that, while there is always a lag time between installing rebar and pouring concrete (*id.* at 16), there is no set time. Rather, the pour would occur when "everybody else" was ready, and that the work of other trades, as well as Sorbara's, had to be scheduled by Turner (*id.* at 17). Thus, there are questions of fact concerning how long the snow was present in the area, when the rebar had been installed, and how long it had been exposed to the elements, which are relevant to a determination of whether defendants had notice of the condition and sufficient time to remedy it.

With respect to which party was responsible for placing a protective covering over exposed rebar, DeRoss testified that

it was Component's or the ironworker's responsibility (*id.* at 25), and that Turner would tell Component to cover the rebar (*id.* at 32). He also testified that Sorbara would at times cover exposed rebar with canvas to protect it from weather if snow was predicted (*id.* at 26 and 30), and Sorbara's work logs show that Sorbara did cover rebar with canvas on the 31st and 32nd floors on January 21, 2005, the night before Turner's work logs show that it snowed. In any event, there is a question of fact concerning which party failed in its duty to cover exposed rebar with a covering which would protect workers traversing the area.

DeRoss testified that Turner removed snow and ice (*id.* at 37), but Sorbara's work logs show that Sorbara also removed snow from the 28th, 30th, and 31st floors on December 27, 2004, January 17, 2005, and January 24, 2005, respectively. Further, as plaintiffs note, the contract under which Turner performed imposed various safety related obligations on it. It cannot, on this motion, be determined which party was responsible for the removal of the snow and ice in the area of the accident, and defendants have offered no argument or evidence in that regard.

Without resolution of these issues, it cannot be determined whether defendants, or any one of them, including Hearst, had notice or should have had notice of the icy and snowy condition of the area in front of the stairs, and if that notice had been sufficient to allow defendants to remedy the condition.

As previously mentioned, defendants made no arguments in their moving papers as to why their motion should be granted based upon lack of notice and have therefore failed to met their burden on summary judgment.

Although defendants correctly maintain that there is no duty to warn of an open or obvious dangerous condition (*see e.g. Wilhouski v Canon U.S.A.*, 212 AD2d 525, 526 [2d Dept 1995]), the Appellate Division, First Department, has held that "[l]iability under section 200 is not negated ... by the 'open and obvious' nature of any danger; rather, these factors go to plaintiff's comparative negligence" (*Maza v University Avenue Development Corp.*, 13 AD3d 65, 65 [1st Dept 2004]).

Summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims is denied.

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'" (*Walker v EklecCo*, 304 AD2d 752, 752 [2d Dept 2003], quoting *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order "to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Walker v Metro-North Commuter Railroad*, 11 AD3d 339, 340 [1st Dept 2004]), as opposed

to "those that establish general safety standards" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). The duty is prescribed upon owners, contractors, and their agents "regardless of the level of control or supervision" which the party exercises over the work (*Piccolo v St. John's Home for the Aging*, 11 AD3d 884, 886 [4th Dept 2004]).

In support of the section 241 (6) claim, plaintiffs' complaint alleges that defendants violated sections 23-1.5, 23-1.7, 23-1.30, 23-2.1, and 23-27 of New York's Industrial Code (12 NYCRR Part 23), but the papers on these motions indicate that plaintiffs have abandoned all but section 23-1.7 as a basis of their claim. Section 23-1.7 has numerous subsections, only two of which have any possible applicability here: subsections 1.7 (d) and (e). These provisions provide, in relevant part, as follows:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway [or] walkway ... which is in a slippery condition. Ice, snow ... and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. ...
>
> (2) Working areas. The parts of floors ... where persons work or

> pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials insofar as may be consistent with the work being performed.

Courts of this state have found that both sections 23-1.7 (d) and (e) are specific enough to support a Labor Law § 241 (6) claim (*see e.g.* for section 23-1.7 [d]: *Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 350-351 [1998]; *Lopez v City of New York Transit Auth.*, 21 AD3d 259 [1st Dept 2005]; for section 23-1.7 [e]: *Smith v McClier Corp.*, 22 AD3d 369 [1st Dept 2005]; *Murphy Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

Plaintiff attests that he slipped off/in the rebar (Plaintiff's Depo., at 33), and his co-worker, McNulty, testified that the top of the rebar was slippery (McNulty 1/29/07 Aff., ¶ 5). Plaintiff also specifically averred that he did not think that there was sand or salt for traction against the snow hazard (Plaintiff's Depo., at 38), and it is uncontested that the exposed rebar was not covered. Thus, section 23-1.7 (d) is applicable in this matter. Defendants have failed to establish that they did not violate this provision of the Industrial Code. Accordingly, summary judgment dismissing the Labor Law § 241 (6) claim based on section 23-1.7 (d) is denied.

With respect to section 23-1.7 (e) (1), however, the court concludes that section 23-1.7 (e) (1) is inapplicable because plaintiff was not injured in a "passageway." The

language of the case law on the issue of what constitutes a "passageway" appears to focus on the spatial characteristics and/or the use put to the areas in issue, rather than the make-up or composition of the areas in question (*see e.g. Burkoski v Structure Tone*, 40 AD3d 378, 382 [1st Dept 2007] [plaintiff was injured in an "room" not as "passageway" in spite of the fact that he was walking across it]; *Smith v Hines GS Properties*, 29 AD3d 433, 433 [1st Dept 2006] [open area between building and storage trailers was not a "passageway"]; *Canning v Barneys New York*, 289 AD2d 32, 34 [1st Dept 2001] ["path" between shed and room where plaintiff was working was not a "passageway"]). Although the Second and Fourth Departments of the Appellate Division have at times seemed to lump the provisions of sections 23-1.7 (e) (1) and (e) (2) together (*see Verel v Ferguson Electric Construction Co.*, ___ AD3d ___, 2007 WL 1651937, *2, 2007 NY App Div LEXIS 7152, *5-6; 2007 NY Slip Op 04903, *2 [4th Dept 2007] [section 23-1.7 (e) (1) inapplicable because pipe plaintiff tripped over was integral part of construction and plaintiff was working in large, open area, not passageway]; *Dubin v S. DiFazio & Sons Construction*, 34 AD3d 626, 627 [2d Dept 2006] [sections 23-1.7 (e) (1) and (2) inapplicable because plaintiff tripped on object that was integral part of work being done]), the First Department has instead found that section 23-1.7 (e) (1) contains "more stringent requirements" than section 23-1.7

(e) (2) (*see Canning*, 289 AD2d at 34).

Summary judgment dismissing the part of plaintiffs' Labor Law § 241 (6) claim which is based on Industrial Code section 23-1.7 (e) (2) is also granted. It is well settled that section 23-1.7 (e) (2) does not apply when the object tripped over is "an integral part of the work being performed" (*Tucker v Tishman Construction Corp. of New York*, 36 AD3d 417, 417 [1st Dept 2007]; *see also Boyd v Mammoet Western, Inc.*, 32 AD3d 1257, 1258 [4th Dept 2006]).

Thus, the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim which is based on 12 NYCRR 23-1.7 (e) is granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' cross motion is granted; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims is denied; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim which is based on 12 NYCRR 23-1.7 (d) is denied; and it is further

ORDERED that the part of defendants' motion which seeks

summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim which is based on 12 NYCRR 23-1.7 (e) (1) and (e) (2) is granted.

This Constitutes the Decision and Order of the Court.

Dated: September 5, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN