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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 116427/2004
KUTZA,MARIANNE
VS.
BOVIS LEND LEASE
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 for summary jud mot is decided per attached

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/7/11

EMILY JANE GOODMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

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

----------X

MARIANNE KUTZA, as Administratrix for the Estate of THOMAS PYLE, and MARIANNE KUTZA, individually,

Plaintiffs,

-against-

BOVIS LEND LEASE LMB, INC., and HUDSON WATERFRONT COMPANY B, LLC,

Defendants.

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Index No. 116427/04

EMILY JANE GOODMAN, J.S.C.:

This is an action to recover damages for personal injuries sustained by a tile finisher on September 18, 2002 at 220 Riverside Drive in Manhattan (the premises). Defendants Bovis Lend Lease LMB, Inc. (Bovis) and Hudson Waterfront Company B, LLC (Hudson) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Hudson is the owner of the premises. Bovis was hired as a construction manager to perform construction work on the premises. The project involved the construction of a 52-story structure containing 450 residential condominium units. Decedent Thomas Pyle was an employee of G.M. Crocetti, Inc. (G.M. Crocetti), a subcontractor which was hired to perform ceramic tile and marble installation at the building.

There is no dispute that decedent died due to causes unrelated to the accident, before his deposition was taken. A death certificate indicates that decedent died on November 16, 2007 as a result of a cardiac arrest and atherosclerosis (Cox Affirm. in Support, Exh. E).

James Gahn testified at his deposition that, in September 2002, he was employed as a tile

finisher for G.M. Crocetti, and was working at the subject premises (Gahn EBT, at 13-14). According to Gahn, the tile finishers distributed materials for the tile setters, and performed grouting work when the tile was installed (*id.* at 15, 16). Gahn recalled that decedent was also a tile finisher (*id.* at 18). Gahn testified that, before the accident, he was working with decedent on the 33rd floor, and went upstairs to the 34th floor to start setting up (*id.* at 21). He was on the 34th floor for a short time before the accident (*id.* at 22). When Gahn heard decedent screaming and yelling his name, he came running downstairs (*id.* at 28). Gahn testified as follows:

"Q: What happened after you ran down the stairs?

A: I seen him in the hallway, he was holding his wrist and I thought he, you know, like did something. I didn't know exactly. He was just holding his wrist. But by the time I got all the way down I could see the blood and then I knew he did something really bad. You know, there was quite a bit of blood.

Q: When you saw him, was he standing up or sitting down?

A: He was standing up. He was, you know, he was panicking basically.

Q: Was he holding his wrist with his bare hand?

A: Yes, yes. He was holding his – yes.

Q: Was he leaning against the wall or just standing?

A: No. He was just standing screaming.

Q: What happened after you approached him?

A: I asked him, you know, what happened. I seen all the blood. He said he fell over the garbage. Fucking garbage, if you want to be exact.

Q: Did he say where the garbage was that he fell over?

A: He just said, you know, he fell on the garbage. That's it. You know, exactly where, I don't know.

Q: Did he describe, did he say it was garbage or did he say it was debris or something else?

A: He just said he fell over the garbage.

Q: What did he say after that?

A: Well, I told him he better sit down because he was going to die if he doesn't sit down. He was kind of running around, you know, he was panicking. And we got him to sit. I don't know how the bench was there. It was there. There was a bench. I don't know how, but it was there"

(*id.* at 30-32). Gahn did not recall the number of the apartment where decedent fell, but stated that decedent fell near where Jimmy Hassan was working, just outside the bathroom (*id.* at 38-39). Gahn further testified that, on the morning of the accident, there was scattered construction debris on the floor of the apartment in which decedent was working (*id.* at 45-46). Bovis was required to clean up the debris and garbage (*id.* at 42, 43).

Felice DeFalco testified that he was employed as a tile foreman by G.M. Crocetti on the date of the accident (DeFalco EBT, at 9). DeFalco was working on the floor where decedent was working one hour before the accident (*id.* at 17). According to DeFalco, there were electricians, spacklers, tapers, and carpenters working on the 33rd floor on the day of the accident (*id.* at 19). DeFalco inspected the room where decedent was working before the accident, and observed broken pieces of sheetrock, discarded electrical wires, taping compound, and garbage on the floor (*id.* at 22). According to DeFalco's testimony, the debris was left on the floor by other trades (*id.* at 24). DeFalco testified that Bovis laborers were responsible for removing the debris and cleaning the floors (*id.* at 32). He made complaints to Bovis's assistant supervisor about the debris, both before and after decedent's accident (*id.* at 26, 27). DeFalco stated that "[t]here was so much debris we couldn't pass through the halls with our materials and equipment" and that it

was "[v]ery dirty to be working in, unsanitary" (*id.* at 26).

Plaintiff Marianne Kutza testified that, when she saw her husband in the hospital after the accident, he told her that "he fell at work, fell on debris when he was walking from one part of the room to the other. He fell forward and cut his hand open on marble, piece of marble" (Kutza EBT, at 28). She stated that her husband told her that the debris was on the floor (*id.* at 35-36).

The complaint was filed on November 19, 2004, and contains claims for common-law negligence and violations of Labor Law §§ 200, 240, 241 (a), and 241 (1-6). Plaintiff Marianne Kutza asserts a derivative cause of action for loss of society, services, companionship, and consortium. Plaintiffs' verified bill of particulars alleges that defendants violated Labor Law §§ 200, 240 (1), 241 (6), 29 CFR 1910 and 1926, and 12 NYCRR 23-1.2 (a), 23-1.5 (a), 23-1.7 (d), 23-1.7 (e) (1), and 23-1.7 (e) (2) (Verified Bill of Particulars, ¶ 25). On September 10, 2008, after decedent's death, the court granted plaintiffs' motion to substitute the estate of decedent as a party plaintiff and to amend the caption and pleadings to reflect the appointment of Marianne Kutza as administratrix of the estate.

THE PARTIES' CONTENTIONS

Defendants now move for summary judgment, arguing that there is no admissible evidence regarding the cause of decedent's accident. Defendants point out that: (1) decedent's accident was unwitnessed; (2) decedent's co-workers did not observe the room where the accident allegedly occurred immediately before the accident; and (3) decedent died for reasons unrelated to the accident, before his deposition could be conducted. According to defendants, there are several possible causes of decedent's injury, for one or more of which defendants would not be responsible, including a misstep, loss of balance, and/or tripping condition created by

decedent.

In opposition to defendants' motion, plaintiffs contend that, although decedent died before his deposition was conducted, there is other admissible evidence regarding the cause of the accident. First, plaintiffs argue that decedent's statements to James Gahn that his fall was caused by tripping on construction debris and garbage, are admissible as "excited utterances" or "present sense impressions." Second, plaintiffs assert that decedent's sworn testimony before the Social Security Administration is admissible because it contains declarations against his interest, given that decedent testified that he tripped on jobsites in the past, and was able to drive, clean, and walk his dog (Fortunato Affirm. in Opposition, Exh. 3 [Hearing Tr., at 7, 11]). Third, according to plaintiffs, decedent's Workers' Compensation Board records are admissible as "public documents," as "some evidence" of these issues, and the court may take judicial notice of Workers' Compensation Board records (*id.*, Exh. 2).[1] Thus, with respect to the Labor Law § 241 (6) claim, plaintiffs argue that the evidence submitted by plaintiffs is sufficient to establish prima facie violations of 12 NYCRR 23-1.7 (e) and 23-2.1.[2] Finally, as to the common-law negligence and Labor Law § 200 claims, plaintiffs maintain that there is evidence of both actual and constructive notice of the debris in question, that the debris was not part of decedent's work, and that Bovis was responsible for clearing such debris.

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[1]Decedent's Workers' Compensation Board claim for compensation (C-3 form) states, in response to the question "How did the injury occur?," that "While at work carrying a bucket of thinset, I tripped and fell over debris on floor landing against wall striking loose tile injuring myself" (Fortunato Affirm. in Opposition, Exh. 2).

[2]Plaintiffs also submit, in opposition, a supplemental verified bill of particulars, in which they allege violations of 12 NYCRR 23-2.1 (a) (1) and (a) (2) (Fortunato Affirm. in Opposition, Exh. 1, Supplemental Verified Bill of Particulars, ¶ 25 [c]).

In reply, defendants argue that plaintiffs cannot establish a prima facie case under either Labor Law §§ 241 (6) or 200. As to Labor Law § 241 (6), defendants point out that plaintiffs refer to an Industrial Code provision not contained within the bill of particulars, section 23-2.1. Defendants argue that this alleged code violation involves new factual allegations and a new theory of liability based upon speculation, i.e., that improperly stored construction materials caused the accident. In any event, defendants argue that plaintiffs cannot establish violations of either section 23-1.7 or 23-2.1. As for Labor Law § 200, defendants assert that there is no evidence establishing what condition decedent tripped over or evidence as to how long the garbage or debris was in the area of the accident. Further, defendants maintain that all of the evidence relied upon by plaintiffs as to the cause of decedent's accident is inadmissible hearsay.

DISCUSSION

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "[T]he court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

To impose liability upon a defendant for violations of the Labor Law or common-law

negligence, the violations or negligence must constitute a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875 [1998]; *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 676 [2d Dept 2004]). Proximate cause requires a showing that the defendant's act or failure to act "'was a substantial cause of the events which produced the injury'" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). In *Lynn v Lynn* (216 AD2d 194, 195 [1st Dept 1995]), the First Department wrote that:

> "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury"

(internal quotation marks and citation omitted). The plaintiff's evidence "must be sufficient to permit a finding of proximate cause based [upon] logical inferences, not speculation" (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). Hearsay has been defined as an out-of-court statement, offered for the truth of the matter asserted (*Nucci v Proper*, 95 NY2d 597, 602 [2001]; Prince, Richardson on Evidence § 8-101 [Farrell 11th ed]). Hearsay may be considered in opposition to a motion for summary judgment as long as it is not the only evidence offered in opposition (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]; *Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]). Here, the issue is whether there is any admissible evidence as to the cause of decedent's accident, and whether plaintiffs' evidence is entirely based upon speculation, conjecture, and hearsay.

Excited Utterance

An out-of-court statement is admissible under the "excited utterance" or "spontaneous declaration" exception to the hearsay rule when it is "made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication" (*People v Johnson*, 1 NY3d 302, 306 [2003]; *see also* Prince, Richardson on Evidence § 8-604 [Farrell 11th ed]). "'Underlying this exception is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication and, accordingly, any utterance he makes will be spontaneous and trustworthy'" (*Johnson*, 1 NY3d at 306, quoting *People v Edwards*, 47 NY2d 493, 497 [1979]). The key elements of excited utterances are spontaneity and an excited mental state (*People v Vasquez*, 88 NY2d 561, 574-575 [1996]).

Courts have considered various factors in determining whether a statement qualifies as an excited utterance:

> "(1) the nature of the startling or traumatic event; (2) the amount of time between the event and the statement; . . . (3) the activities of the declarant between the event and the statement; (4) whether the declarant had an opportunity to deliberate and thus deviate from the truth; and (5) whether the circumstances indicate that the statement was not made under the impetus of studied reflection"

(*People v Diaz*, 21 AD3d 58, 65-66 [1st Dept 2005], *appeal dismissed* 7 NY3d 831 [2006] [internal quotation marks and citations omitted]). With respect to the second factor – the amount of time between the event and the statement – courts have held that "the time for reflection is not measured in minutes or seconds, but rather is measured by facts" (*Vasquez*, 88 NY2d at 579 [internal quotation marks and citation omitted]). Another consideration is whether there has been physical shock or trauma (*People v Vega*, 3 AD3d 239, 250 [1st Dept], *lv denied* 2 NY3d

766 [2004]). "While any serious injury may be a significant factor in determining whether the declarant remains under the stress of a startling event, it is not the only factor" (*Johnson*, 1 NY3d at 307). Even responses to a question may qualify as an excited utterance (*People v Cotto*, 92 NY2d 68, 79 [1998]). "[T]he decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" (*Edwards*, 47 NY2d at 497; *see also Johnson*, 1 NY3d at 307).[3]

In *Heer v North Moore St. Devs., L.L.C.* (61 AD3d 617, 618 [1st Dept 2009]), a case relied upon by plaintiffs, the plaintiff's co-worker stated that he heard the plaintiff's fellow bricklayers yelling that the plaintiff had fallen backwards off a sidewalk bridge at the work site. The co-worker rushed to the plaintiff's aid and found the plaintiff lying on the ground near the building, near a gap between the sidewalk bridge and the building (*id.*). The First Department held that the plaintiff was entitled to summary judgment on the issue of liability under Labor Law § 240 (1), reasoning that "[t]he lack of witnesses to the accident and plaintiff's inability to recall how the accident happened notwithstanding, plaintiff submitted sufficient admissible proof to establish prima facie that his head injury was the result of a fall from a sidewalk bridge at his work site," and that he was not provided with any devices to protect him from such an elevation-related hazard (*id.* at 617-618). Specifically, the Court noted that "[s]ince the record affords no basis for any conclusion other than that the bricklayer's exclamations were '*made under the stress of excitement caused by an external event, and not the product of studied reflection and*

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[3]Contrary to defendants' contention, excited utterances generally do not require corroborating evidence because they are inherently reliable, given the circumstances under which they are made (*People v Fratello*, 92 NY2d 565, 577 [1998, Smith, J. dissenting], *cert denied* 526 US 1068 [1999]).

possible fabrication,' the exclamations were admissible as excited utterances" (*id.* at 618, quoting *Johnson*, 1 NY3d at 306 [emphasis supplied]).

In *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.* (94 AD2d 617, 619 [1st Dept 1983], *affd* 61 NY2d 769 [1984]), a heavily bleeding bicyclist's declaration almost immediately after an accident that he had been hit by a bus was held to be admissible as a spontaneous declaration.

By contrast, in *Lieb v County of Westchester* (176 AD2d 704, 706-707 [2d Dept 1991]), a bus driver's out-of-court statement that a driver of an unidentified car had "cut him off," thereby causing a collision, was held not to be admissible, where there was no showing of the driver's mental state or emotional demeanor.

In this case, decedent's co-worker, James Gahn, testified that decedent told him that he "fell over the garbage," after Gahn ran down the stairs upon hearing decedent screaming (Gahn EBT, at 30, 31). Although decedent's statement was made in response to Gahn's question, Gahn testified that when he saw decedent, he was "standing screaming," "panicking," and that there was "quite a bit of blood" (*id.* at 31). This evidence suggests that decedent's statement was made "under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection" (*Cotto*, 92 NY2d at 78-79 [internal quotation marks and citation omitted]). Therefore, decedent's statement to his co-worker that he "fell over the garbage" may be admissible at trial as an excited utterance (*see Heer*, 61 AD3d at 618; *see also Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007, 1010 [2d Dept 2011] [decedent's statement that aide left her unattended on porch, made to plaintiff shortly after the accident, was admissible as

excited utterance]; *Levbarg v City of New York*, 282 AD2d 239, 241 [1st Dept 2001] [decedent's statement at the scene of the accident to his wife that he had fallen "in the trench" was potentially admissible at trial as excited utterance]).

Present Sense Impression

In *People v Brown* (80 NY2d 729, 732 [1993]), the Court of Appeals adopted the present sense impression exception to the hearsay rule, which allows admission of "testimony of a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." In addition, there must be some corroborating evidence of the contemporaneity and reliability of the out-of court statements (*Vasquez*, 88 NY2d at 575; *see also* Prince, Richardson on Evidence § 8-603 [Farrell 11th ed]). Such statements are deemed to be reliable "because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory" (*Vasquez*, 88 NY2d at 574). The key elements of a present sense impression are contemporaneity and corroboration (*id.* at 575).

Corroboration "will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court" (*Brown*, 80 NY2d at 737). "[T]he critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content" (*Vasquez*, 88 NY2d at 576).

For example, in *Jara v Salinas-Ramirez* (65 AD3d 933, 934 [1st Dept 2009]), a personal injury action arising out of a hit-and-run accident, the plaintiff's testimony regarding statements allegedly made by two witnesses identifying the license plate number of the offending vehicle was admissible under the present sense impression exception to the hearsay rule. The

corroboration consisted of other testimony, which accurately described the offending vehicle as a dark-colored van, and asserted that the witness made her statement to the police at the accident scene 10 minutes after the accident (*id.*).

In *Bayne v City of New York* (29 AD3d 924, 925-926 [2d Dept 2006]), a pedestrian's statement to an emergency medical services worker that she had tripped and fallen was admissible as a present sense impression.

Here, decedent's statement to his co-worker that he "fell over the garbage" (Gahn EBT, at 31), may also be admissible at trial as a present sense impression. Decedent's statement was made immediately after his accident (*id.* at 30). Furthermore, plaintiffs have pointed to certain facts which corroborate the cause of decedent's accident. Two employees of G.M. Crocetti testified that there were several other trades working on the 33rd floor, and that there was garbage and debris on the floor where decedent was working before the accident (*id.* at 21, 45, 48; DeFalco EBT, at 21-23).

Workers' Compensation Board Records and Social Security Administration Testimony

Moreover, plaintiffs have submitted decedent's Workers' Compensation Board C-3 form, which states that decedent "tripped and fell over debris on [the] floor landing against wall striking loose tile injuring myself" (Fortunato Affirm. in Opposition, Exh. 2). Additionally, plaintiffs provide decedent's testimony before the Social Security Administration, which described his accident as follows:

> "And, I, I was carrying [thinset] back into the bedroom and the wet saw was here, and I just moved over a little bit into the closet, and I tripped over the debris that was there. And, when I went down, I had marble leaning up against the side of the door jam because we were doing the front of the Jacuzzi. And, that, and that's what I hit"

(*id.*, Exh. 3, at 7). Even assuming that such statements constitute hearsay, "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran*, 78 AD3d at 537). As noted above, plaintiffs have offered potentially admissible, direct evidence as to the cause of decedent's accident. Therefore, the court concludes that there are triable issues of fact as to whether the garbage and debris on the floor were the proximate cause of decedent's fall and injuries.

Labor Law § 241 (6)

Defendants argue, for the first time in their reply, that plaintiffs cannot establish causes of action under Labor Law §§ 241 (6) and 200. Although these arguments were made in reply, the court may consider these assertions because they were made in response to plaintiffs' arguments in opposition to the motion and defendants raise nothing new (*see Home Ins. Co. v Leprino Foods Co.*, 7 AD3d 471, 472-473 [1st Dept 2004] [plaintiff's no-oral-modification argument, raised for the first time in reply, could be considered, because it was directly responsive to defendant's opposition to plaintiff's summary judgment motion]; *Davison v Order Ecumenical*, 281 AD2d 383 [2d Dept 2001] [trial court properly considered arguments raised in defendants' reply affirmation, since they were made in direct response to plaintiffs' opposition papers]; *cf. Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Labor Law § 241 (6) provides as follows:

> "All areas in which construction, excavation or demolition 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) is not self-executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160, *rearg denied* 56 NY2d 805 [1982]). In *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494, 505 [1993]), the Court of Appeals held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not."

Thus, to prevail under Labor Law § 241 (6), the plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

In this case, plaintiffs' verified bill of particulars alleges violations of 12 NYCRR 23-1.2 (a), 12 NYCRR 23-1.5 (a), 12 NYCRR 23-1.7 (d), and 12 NYCRR 23-1.7 (e) (1) and (2) (Verified Bill of Particulars, ¶ 25 [c]). In opposition to defendants' motion, plaintiffs rely upon sections 23-1.7 (e) (1) and (2), and assert an additional violation of section 23-2.1. Thus, plaintiffs have effectively abandoned reliance on sections 23-1.2 (a), 23-1.5 (a), and 23-1.7 (d).

With respect to section 23-2.1, although plaintiffs did not allege this violation in the bill of particulars, plaintiffs' failure to do so is not fatal. It is well settled that an Industrial Code provision may be raised for the first time in opposition to a summary judgment motion, as long as the belated allegation "entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to the defendant[s]" (*Cordeiro v TS Midtown Holdings, LLC*, 87

AD3d 904 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]; *Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560 [1st Dept 2010]). Here, the alleged violation of section 23-2.1 does not raise any new factual allegations or theories of liability and does not cause any prejudice to defendants. Therefore, the court shall consider whether sections 23-1.7 and 23-2.1 are specific and applicable to this case.

Section 23-1.7 provides as follows:

"(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. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. 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"

(12 NYCRR 23-1.7).

Sections 23-1.7 (e) (1) and (2) have been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]). However, neither subdivision of section 23-1.7 applies where the injured worker trips over materials which are integral to the work being performed (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006] [construction worker was not entitled to recovery under Labor Law § 241 (6), based on 12 NYCRR 23-1.7 (e) (1) or (2), because the pipe or conduit that he tripped over was an integral part of the construction work]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept

2008] [debris accumulated as a result of demolition was not an integral part of electrician's work]; *Lenard v 1251 Ams. Assoc.*, 241 AD2d 391, 393 [1st Dept], *appeal withdrawn* 90 NY2d 937 [1997] [doorstop did not constitute an integral part of work, and constituted both "debris" and "sharp projection"]).

Here, the court finds that section 23-1.7 (e) (2) applies, and that there are issues of fact as to whether any violation caused decedent's injuries. There is evidence that decedent tripped over "garbage" or "debris" on the floor, and that work was being performed where decedent was injured (Gahn EBT, at 31, 38; DeFalco EBT, at 22, 24). Additionally, according to G.M. Crocetti's foreman, the debris was left on the floor by other trades (DeFalco EBT, at 24). Nevertheless, the court concludes that section 23-1.7 (e) (1) is inapplicable because there is no evidence that decedent was injured in a passageway.

In pertinent part, section 23-2.1, which governs "Maintenance and Housekeeping," states:

"(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger and person employed in the area of such disposal or any person lawfully frequenting such area"

(12 NYCRR 23-2.1).

Section 23-2.1 (b) has been held to be too general to support a Labor Law § 241 (6) claim (*Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007]; *Lynch v Abax, Inc.*, 268 AD2d 366, 367 [1st Dept 2000]; *Mendoza v Marche Libre Assoc.*, 256 AD2d 133 [1st Dept 1998]). Therefore, plaintiffs' reliance on this subsection is misplaced.

Although section 23-2.1 (a) has been held to be sufficiently specific (*Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [2d Dept 1997]), the court concludes that neither subdivision (a) (1) nor (a) (2) applies to the facts of this case. There is no evidence that decedent's accident occurred in a "passageway, walkway, stairway or other thoroughfare" (12 NYCRR 23-2.1 [a] [1]; *see also Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept 2007]). Moreover, plaintiffs do not allege that decedent's accident occurred as a result of the "safe carrying capacity of [a] floor, platform or scaffold," or "[m]aterial [or] equipment . . . [that] was placed [too] close to [the] edge of a floor, platform or scaffold" (12 NYCRR 23-2.1 [a] [2]). Rather, plaintiffs allege that decedent's accident occurred as a result of tripping on garbage or debris.

In sum, plaintiffs have a valid Labor Law § 241 (6) claim, to the extent that it is based on a violation of 12 NYCRR 23-1.7 (e) (2).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is merely a codification of the common-law duty imposed upon property owners and general contractors to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]). Where the plaintiff's injury arises out of the means or methods of the work, the plaintiff must demonstrate that the owner or contractor supervised or controlled the activity giving rise to the

injury (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). In contrast, where the plaintiff's injury arises out of a dangerous or defective condition on the premises, the owner or contractor may be held liable only if it created or had actual or constructive notice of the condition (*Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]). "To constitute constructive notice, a defect 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]).

Here, decedent's injury stems from a dangerous premises condition, i.e., the garbage or debris on the floor, not the means or methods of his tile finishing work (*see Murphy*, 4 AD3d at 202). Additionally, contrary to defendants' assertion, there is evidence of both actual and constructive notice of debris. G.M. Crocetti's tile foreman, Felice DeFalco, testified that he made complaints to Bovis's assistant supervisor about debris before the accident (DeFalco EBT, at 26, 27). DeFalco testified that, prior to the accident, there was construction debris in the room where decedent was working (*id.* at 22). According to DeFalco, Bovis laborers were required to remove the debris (*id.* at 32). Decedent's co-worker, James Gahn, also testified that the debris was present when the workers arrived on the 33rd floor on the morning of the accident, several hours before the accident (Gahn EBT, at 18, 52). It is for the jury to determine whether the garbage or debris caused decedent's accident.

Accordingly, defendants are not entitled to dismissal of the Labor Law § 200 and common-law negligence claims asserted against them.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 004) of defendants Bovis Lend Lease LMB, Inc. and Hudson Waterfront Company B, LLC for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 241 (6) claim, insofar as predicated on 12 NYCRR 23-1.7 (e) (1) and 23-2.1, and is otherwise denied; and it is further

ORDERED that a pretrial conference is scheduled for December 8, 2011 at 10:30 am.

This Constitutes the Decision and Order of the Court.

Dated: November 7, 2011

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

EMILY JANE GOODMAN