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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

MIROSLAW WIERZBICKI,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION AND NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

Index No: 26782/11

Motion Date: 9/13/13

Motion Seq. No.: 4

The following papers numbered 1 to 11 read on this motion by defendants for summary judgment dismissing the complaint

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 11

Upon the foregoing papers it is ordered that this motion is determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained on December 10, 2010 when he allegedly slipped and fell due to the presence of ice on the roof of John Bowne High School (hereinafter the high school). WDF Construction (hereinafter WDF), the plaintiff's employer, was hired as the general contractor for a renovation project at the high school which included roof work. The plaintiff commenced this action against The City of New York, New York City Department of Education and the New York City School Construction Authority (hereinafter SCA) alleging causes of action for common law negligence and violations of Labor Law §§ 200 and 241(6).

The defendants now move for summary judgement dismissing the complaint relying upon the plaintiff's deposition testimony and testimony at the 50-h hearing, the deposition testimony and

affidavit of Joseph Scalisi employed by the SCA as a Senior Project Supervisor and the affidavit of Christopher Dickerson, employed by The City of New York as Senior Insurance Claims Representative.

The plaintiff testified, in relevant part, at both the 50-h hearing and his deposition that he was engaged in repairing the roof of the high school, and he slipped and fell on a patch of ice which was about 3' X 2' while carrying a bag of gravel which was used in the roof repair work. He testified that he did not see the particular ice patch because it was dark and there were no lights on the roof except what the workers brought to the site to illuminate the area where they were actually working. Plaintiff also testified that they worked after school hours from about 3:30 p.m. to midnight, and his accident occurred at about 9:00 p.m. He further testified that it had not rained on December 10, 2010, but it did rain on the two days prior to his accident, that it was "cold", "windy", "frosty" and freezing temperatures on the roof and there were some patches of ice in different places on the roof. Plaintiff also testified that he did not complain about the ice or the lights because he didn't know to whom to complaint and, in any event, there was no one present to whom he could complain since the WDF foreman only came to the job one or two a week.

Scalisi testified at his deposition that he is employed by SCA as a senior project supervisor, that he has full knowledge of the operations of the SCA, that on December 10, 2010, his duties with respect to the renovation at the high school was to oversee SCA's project officer James Donovan and that he only went to the high school maybe once every three months or so regarding change orders. Scalisi testified that Donovan was responsible for overseeing the renovation project which included daily contact and involvement with the architect, the engineer, subcontractors and the project manager of WDF, the general contractor hired by SCA. Scalisi testified that he had nothing to do with procuring the contract between SCA and WDF, he has never read the contract and believes the work began in 2007 and was expected to be completed in January, 2013.

Dickerson avers in his affidavit that he is and was on December 10, 2010 a Senior Insurance Claims Specialist employed by the City Of New York, and as such, he has personal knowledge of the operations of the "agency" and all departments, including the New York City Department of Education and is familiar with the records maintained by the City of New York. He asserts that he made a search of the records of the City of New York regarding the renovations at the high school and he did not find any

records of complaints of ice or insufficient lighting on the roof nor any accident reports of the plaintiff's alleged accident. He further asserts that his search of the records revealed that the City of New York did not have any employees at the high school working on the renovation project; did not enter into any contracts with WDF or anyone else; did not provide any materials, tools or equipment of any kind in performing the work or any personal protective or safety equipment of any kind, nor receive any complaints about these items; did not supervise, instruct or direct any contractor in any way and was not responsible for maintenance/housekeeping or snow & ice removal in the areas involved in the project.

Scalisi asserts in his affidavit that his job was to oversee the project officer, Donovan, who was responsible for the project at the high school making sure that WDF complied with contract specifications. In all other respects his affidavit is exactly the same as Dickerson's with the exception that it is asserted as to SCA and not the City of New York.

On a motion for summary judgment, the movant bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The defendants seek dismissal of plaintiff's common law negligence and Labor Law § 200 causes of action on the ground that they cannot be held liable for common law negligence or for violation of Labor Law §200 since they did not have the authority to control the means and methods of the plaintiff's work and that they did not create the icy condition or have actual or constructive notice of it.

The defendants have failed to demonstrate, prima facie, their entitlement to summary judgment dismissing the plaintiff's common law negligence and Labor Law § 200.

It is well settled that the owner, operator and possessor of property has the duty to maintain the premises in a reasonably safe condition in light of all the circumstances, including the likelihood of injury to those on the property, the seriousness of the injury, and the burden of avoiding the risk (see Ruggiero v. City School Dist. of New Rochelle, 109 AD3d 894 [2013]; Peralta v. Henriquez, 100 NY2d 139, 144 [2003], citing Basso v. Miller, 40 NY2d 233, 241 [1976]). In addition, Labor Law § 200 codifies

the common-law duty of owners, employers and contractors to provide employees, including the employees of independent contractors (see Backiel v. Citibank, 299 AD2d 504, 505 [2002]) , with a safe place to work (see Paladino v. Soc'y of the NY Hosp., 307 AD2d 343 [2003]; Brasch v. Yonkers Constr. Co., 306 AD2d 508 [2003]). Liability under Labor Law § 200 fall into two categories. The first involves the case where the injury results from an alleged defective or dangerous condition of the premises where the work is performed (see Chowdhury v. Rodriquez, 57 AD3d 121[2008]) and the second, where the injuries arises from the means and methods of the work (see Ortega v. Puccia, 57 AD3d 54 [2008]).

Where, as here, the injury results from an alleged dangerous or defective condition of the property, liability based upon common law negligence and Labor Law § 200 can be imposed on the defendants if the defendants created or had actual or constructive notice of the alleged condition and a reasonable opportunity to correct it (see Reyes v. Arco Wentworth Management Corp., 83 AD3d 47, 49 [2011]; Scott v. Redl, 43 AD3d 1031 [2007]).

When a motion for summary judgment is based on lack of notice, the movants have the initial burden of making "a prima facie showing affirmatively establishing lack of notice as a matter of law" (Roussos v. Ciccotto, 15 AD3d 641, 642 [2005] quoting Meyer v. Pathmark Stores, 290 AD2d 423 [2002]; see Levine v. Amverserve Assn., Inc., 92 AD3d 728 [2012]; Jackson v. Jamaica First Parking, LLC, 91 AD3d 602 [2012]; Arzola v. Boston Props. Ltd. Partnership, 63 AD3d 655, 656 [2009]). To satisfy their initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time of plaintiff's accident (see Mercedes v. City of New York, 107 AD3d 767 [2013]; Levine v. Amverserve Assn., Inc., supra at 729; Pryzywalny v. New York City Tr. Auth., 69 AD3d 598, 599 [2010]; Arrufat v. City of New York, 45 AD3d 710 [2007]).

The defendants' evidence which merely demonstrates that they did not have the authority to supervise or direct the plaintiff's work, is insufficient to demonstrate, prima facie, their entitlement to dismissal of the plaintiff's common law negligence and/or Labor Law § 200 claims.

Where, as here the plaintiff's claim is based upon an alleged unsafe or dangerous condition of the premises, supervisory authority is not an element of a Labor Law § 200 cause of action (see Roppolo v. Mitsubishi Motor Sales of Am.,

278 AD2d 149, 150 [2000] quoting Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1998]; Ortega v. Puccia, supra). The defendants failed to submit any evidence to show that they did not own, operate, maintain, manage or control the premises (see Morgan v. Neighborhood Partnership Housing Development Fund Co., Inc., 50 AD3d 866 [2008]; Canaan v. Costco Wholesale Membership, Inc., 49 AD3d 583 [2008]; Hellyer v. Law Capitol, Inc., 124 AD2d 782, 783) [1986]), that they did not have constructive notice of the condition (see Reyes v. Arco Wentworth Management Corp., supra at 52-53 [2011]; Slikas v. Cyclone Realty, LLC, 78 AD3d 144, 149) or that they exercised reasonable care in maintaining the property in a reasonably safe condition (see Blake v. City of Albany, 48 NY2d 875, 877 [1979]). On the contrary, the evidence demonstrates that the defendants never inspect the roof at any time prior to the plaintiff's accident (see Reyes v. Arco Wentworth Management Corp., supra). The affidavit of Dickerson based entirely upon a search of records and the affidavit and deposition testimony of Scalisi are insufficient to establish lack of constructive notice.

The defendants' claim that the icy condition, which they describe as "black ice", was not visible and apparent and could not have been discovered upon a reasonable inspection, is without merit and unsupported by the evidence in this case. Contrary to the defendant's claim, plaintiff did not testify that the ice was not visible, he testified that he could not see the particular patch of ice on which he slipped, because it was dark and there were no lights on the roof except that which the worker's brought to illuminate their work area. He also testified that it did not rain on the day of his accident, but it had rained during the two previous days and it was "cold", "windy", "frosty" and freezing temperatures on the roof. This unrebutted testimony is sufficient to raise a triable issue of fact regarding constructive notice.

Accordingly, the branch of the defendants' motion for summary judgment dismissing the plaintiff's common law negligence and Labor Law § 200 claim is denied.

In support of dismissal of the plaintiff's Labor Law § 241(6) claim, defendants contend that plaintiff failed to comply with General Municipal Law (GML)§ 50-e(2) by failing to set forth in the Notice of Claim the sections of the Industrial Codes allegedly violated; and that the Industrial Codes alleged to have been violated in plaintiff's bill of particulars are not specific and/or not applicable to the facts of the underlying accident.

Pursuant to GML § 50-e (2) ("Form of notice; contents") the Notice of Claim must, among other things, "be in writing, sworn to by or on behalf of the claimant" and set forth:

> "(1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable."

The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the public corporation to locate the place, fix the time and understand the nature of the occurrence so that it can conduct a proper investigation of the allegations contained in the notice of claim and determine the merits of the claim (see Rosenbaum v. City of New York, 8 NY3d 1, 10-11 [2006]; Brown v. City of New York, 95 NY2d 389 [2000]; Canelos v. City of New York, 37 AD3d 637, 637-638 [2007]). The contents and the claim need not be stated in any particular manner or with "literal nicety or exactness" (Purdy v. City of New York, 193 NY 521, 523 [1908]) and does not have to set forth a precise legal theory of recovery (see Matter of Felice v. Eastport/South Manor Cent. School Dist., 50 AD3d 138, 148 [2008]; see also Miller v. City of New York, 89 AD3d 612, 612 [2011]). The court, when making the determination, may consider, among other things, the testimony provided during a General Municipal Law § 50-h examination (see D'Alessandro v. New York City Tr. Auth., 83 NY2d 891, 893 [1994]; Power v. Manhattan & Bronx Surface Operating Auth., 16 AD3d 655, 655-656 [2005]; Aviles v. City of New York, 202 AD2d 530, 531 [1994]).

Upon a review of the Notice of Claim and the plaintiff's testimony at the 50-h hearing the Court finds the Notice of Claim contains sufficient facts to provide the defendants with notice of the plaintiff's claims and to enable them to conduct a proper investigation.

Accordingly, the branch of the motion to dismiss the plaintiff's Labor Law § 241(6) claim for failure to comply with GML 50-e(2) is denied.

Equally without merit is defendants' claim that none of the Industrial Codes cited in the plaintiff's bill of particulars constitute a sufficient predicate for his Labor Law § 241(6) claim.

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in

construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (Rizzuto v. L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis Palmer Hydro-Electric Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 241(6) claim, a plaintiff must plead and prove that his injuries were proximately caused by a violation of an Industrial Code which mandates compliance with concrete specifications applicable to the facts of the case and that such violation was a proximate cause of his injuries (see Rizzuto v. L.A. Wenger Construction Co., supra; Forschner v Jucca Co., 63 AD3d 996 [2009]; Cun-En Lin v. Holy Family Monuments, 18 AD3d 800 [2005]).

Although the plaintiff cited numerous sections and subsections (total of 203) of the Industrial Code in his bill of particulars, in opposition to the defendants' motion he has withdrawn all of them except 12 NYCRR §§ 23-1.7, 23-1.8, 23-1.30 23-2.6 and 23-4.4.

Industrial Code 12 NYCRR 23-1.7(d), relating to prevention of slippery conditions caused by ice, water, or other foreign substances, applies to specified work areas, such as floors, roofs or platforms (see Roppolo v Mitsubishi Motor Sales of America, Inc., supra; McGrath v. Lake Tree Village Associates, 216 AD2d 877, 878 [1995]) and applies to the facts of this case (see Amirr v. Calcagno Const. Co., 257 AD2d 585 [ ]). Contrary to defendants' claim, the area where plaintiff allegedly slipped and fell was part of the roof where the materials necessary to perform his work were located and not in a storage area. However, the remaining portions of § 23-1.7 are inapplicable to the facts of this case.

Similarly, 12 NYCRR § 23-1.30 which provides that illumination sufficient for safe working conditions shall be provided wherever persons are required to work is sufficiently specific and applicable to this case (see Dickson v. Fantis Foods 235 AD2d 452 [1997]).

However, 12 NYCRR 1.8(a) which requires eye protection and (c)(1) and (4) requiring protective head gear and protection from corrosive materials, respectively; 12 NYCRR 23-2.6 pertaining to the construction of exterior masonry walls (see Maldonado v. Townsend Avenue Enterprises, 294 AD2d 207 [2002]); and 12 NYCRR 23-4.4, applicable to excavation operations are inapplicable to the facts of this case.

Accordingly the defendants' motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim insofar as it

is predicated upon the violation of Industrial Code 12 NYCRR §§ 23-1.7 1.8(a)(c)(1)(4), § 23-2.6, § 23-4.4 and all parts of § 23-1.7 except § 23-1.7(d) is granted.

In all other respects the motion is denied.

Dated: November 14, 2013
D# 48

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J.S.C.