

**Ndoye v Metropolitan Transp. Auth.**

2014 NY Slip Op 31494(U)

June 9, 2014

Supreme Court, New York County

Docket Number: 106167/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

CHEIKH NDOYE,

INDEX No. 106167/11

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 002

METROPOLITAN TRANSPORTATION AUTHORITY,  
et al.,

Defendants.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1-3

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

4,5

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion is:

**FILED**

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

JUN 11 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/9/14

  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
CHEIKH NDOYE,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
MTA CAPITAL CONSTRUCTION, MTA METRO  
NORTH RAILROAD, and ST. FRANCIS  
CONSTRUCTION CO.,

Defendants.  
-----X

Index No. 106167/11

Motion Seq. No. 002

**FILED**

JUN 11 2014

DONNA M. MILLS, J.:

COUNTY CLERK'S OFFICE  
NEW YORK

This action arises out of a work site accident which occurred on January 13, 2011 at the Metro North station located in Rye, New York. Plaintiff Cheikh Ndoye, a journeyman ironworker, alleges that he slipped and fell on snow while descending a staircase under construction. Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 200, 240 (1), and 241 (6) as against defendants Metropolitan Transportation Authority (MTA), MTA Capital Construction, MTA Metro North Railroad (Metro North), and St. Francis Construction Co. (St. Francis). Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

**BACKGROUND**

Plaintiff alleges that the owner of the property and the developer of the project at the Rye station were MTA and Metro North, respectively. St. Francis was hired as the general contractor on the jobsite. Plaintiff was an employee of Dutchess County Ironworks (DCI), a subcontractor on the construction site.

Plaintiff testified at his deposition that, on the date of the accident, he was working at the Metro North station in Rye (Plaintiff tr at 21). The project involved making a new platform and replacing the steps (*id.* at 25). Plaintiff testified that when he arrived on the site on January 13, 2011, it was cold and there was a “bunch of snow” present (*id.* at 32). Plaintiff arrived on the site before 7:00 a.m. and prepared his equipment and gear while waiting for the “flag guy” to let the workers know that they could start working (*id.* at 37). When plaintiff got out of his car, the ground was covered in snow (*id.* at 41). According to plaintiff, the general contractor on the project was responsible for cleaning up snow in the area (*id.*). Plaintiff met his foreman near their work truck and started gathering his tools (*id.* at 42). Plaintiff was going to go back to working on the platform and stairs as he had done in the days prior to the accident (*id.* at 43). Plaintiff was to work with Matt Gita on the upper platform on that date (*id.* at 47).

Plaintiff further testified that he made one trip to the upper platform before he was injured (*id.*). The area was not open to commuters (*id.*). Plaintiff stated that there was “a lot of snow” from the existing stairs to the platform because it was an open area; the snow was a “couple of inches” deep and no snow had been cleared before he walked up the steps (*id.* at 50-51). Plaintiff went to the top platform and dropped his tool bag (*id.* at 55). He fell when he was returning to the truck to get more tools (*id.*). Plaintiff slipped and fell when he was descending the steps; when he reached the last step, he placed his foot on the platform and slipped on snow which was on the decking (*id.* at 57). The decking was new and very slippery (*id.*). According to plaintiff, the staircase where he slipped was still in the process of being built; the stairs had handrails, but they were covered in plywood (*id.* at 62-63). Plaintiff testified that he could not grab onto the railing because it was covered in plywood (*id.* at 56). Plaintiff testified that there was no other

way for him to walk from the top platform to his truck, and that this was the same route that he had taken in the days before his accident (*id.* at 68). Plaintiff hit his right knee and left wrist when he fell to the platform (*id.* at 58-59).

Francis Tortorello testified that he was the owner of St. Francis, the general contractor on the jobsite (Tortorello tr at 7). St. Francis was hired pursuant to a written contract with Metro North for station improvements at the Rye and Port Chester stations (*id.* at 35). St. Francis hired DCI as a subcontractor on the project (*id.* at 20). Tortorello testified that St. Francis was responsible for removing snow on stairs that were still being constructed (*id.* at 50). According to Tortorello, for all Metro North work, the contractor is responsible for snow removal as part of the course of the work throughout the duration of the project (*id.* at 54). All site safety responsibilities were kept in-house by St. Francis (*id.* at 21). St. Francis had a site safety representative who was present on the jobsite at the Rye Metro North station essentially every day (*id.* at 14). Metro North employees were also on the site on a daily basis (*id.* at 27).

Plaintiff commenced this action on May 26, 2011, asserting claims for violations of Labor Law §§ 200, 240 (1), 241 (6) and for common-law negligence. Plaintiff further alleges that defendants violated 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.16; and 12 NYCRR 23-1.21 (complaint, ¶ 72; verified bill of particulars, ¶ 3).

### DISCUSSION

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). “Thus, the movant bears the

burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, issue-finding, rather than issue-determination, is key” (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]).

**A. Labor Law § 240 (1)**

Plaintiff moves for partial summary judgment under Labor Law § 240 (1), asserting that he fell from an elevated work station, which did not contain the bare minimum of safety devices to prevent his fall. Specifically, plaintiff contends that the staircase where he fell was missing a railing.

Defendants move for summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim in their favor. Defendants contend, citing *Reyes v Magnetic Constr., Inc.* (83 AD3d 512 [1st Dept 2011]), that the statute does not apply because plaintiff’s accident did not occur as a result of an elevation-related risk. In addition, defendants assert that section 240 (1) does not apply because plaintiff fell on a permanently-installed stairway, which was not being used as a safety device. Alternatively, defendants argue that plaintiff has failed to show that: 1) safety devices, such as those enumerated in the statute, were absent, inadequate or defective, and that such violation was a proximate cause of the accident; and 2) the work involved a significant inherent risk attributable to an elevation differential. Finally, defendants argue that plaintiff’s argument that the handrail would have prevented his accident is pure speculation.

Labor Law § 240 (1) provides, in pertinent part, that:

\* 6  
“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.”

To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). The legislative intent behind the statute is to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

The Court of Appeals has instructed that “courts must take into account the practical differences between ‘the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)’” (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011], quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). “[T]he single decisive question is whether plaintiff’s 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]).

Initially, the court notes that it is undisputed that St. Francis was the general contractor on the job site.

\* 7]

Plaintiff has failed to establish that MTA is the owner of the Metro North station.

Defendants denied knowledge or information sufficient to form a belief as to the truth of the allegation as to whether MTA was an owner of the construction site located at the Metro North station in Rye, New York (answer, ¶ FIRST, responding to complaint, ¶ 13). In moving for summary judgment, plaintiff submits a notice of award from Metro North to St. Francis (Boyle affirmation in support, exhibit J), and DCI's subcontract with St. Francis (which identifies Metro North as the owner) (*id.*, exhibit N). However, these documents do not identify MTA as an owner.

Plaintiff asserts that Metro North was the developer of the project. While a developer such as Metro North may be liable under the statute (*see Matter of East 91<sup>st</sup> St. Crane Collapse Litig.*, 115 AD3d 610, 611 [1st Dept 2014]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 155 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]), plaintiff has not established that Metro North retained any statutory obligations. Plaintiff makes no argument as to how Metro North may be liable pursuant to the Labor Law. Thus, plaintiff has not established prima facie entitlement to summary judgment under Labor Law § 240 (1) as against Metro North.

Plaintiff has also failed to make a prima facie showing that MTA Capital Construction is an owner or a statutory agent (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] [“Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an ‘agent’ under sections 240 and 241”]). Indeed, plaintiff's papers do not articulate how this defendant may be held liable under the Labor Law.

Although some cases have held that a fall from a permanent staircase is not covered under Labor Law § 240 (1) (*see Milanese v Kellerman*, 41 AD3d 1058, 1060 [3d Dept 2007]; *Brennan*

*v RCP Assoc.*, 257 AD2d 389, 391 [1st Dept 1999], *lv dismissed* 93 NY2d 889 [1999]; *Ryan v Morse Diesel*, 98 AD2d 615, 616 [1st Dept 1983]), the First Department has recently held that “the fact that the stairway . . . was originally constructed as a permanent structure does not remove it from the reach of Labor Law § 240 (1)” (*Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550 [1st Dept 2014]). Where the staircase is the sole means of access to and from the work area, the staircase may be deemed a “safety device” within the meaning of Labor Law § 240 (1) (*see Ramirez v Shoats*, 76 AD3d 851, 852 [1st Dept 2010] [issue of fact as to whether stairway was the sole means of descent from the work area and thus a safety device within the meaning of Labor Law § 240 (1)]; *McGarry v CVP 1 LLC*, 55 AD3d 441 [1st Dept 2008] [“court correctly granted summary judgment on plaintiff’s section 240 (1) claim. The makeshift staircase was being used as access to different levels of the work site, including the floor where the injured plaintiff’s safety equipment was stored in a Bovis shanty, and served as the ‘functional equivalent of a ladder’”] [citation omitted]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [1st Dept 2005] [issues of fact as to whether the structure from which plaintiff fell was a permanently affixed ladder which provided the sole means of access to his work site and therefore a “device,” or whether it was a permanent staircase not designed as a safety device]).

In *Nunez v Bertelsman Prop.* (304 AD2d 487, 488 [1st Dept 2003]), the plaintiff fell down a staircase without handrails connecting two levels of scaffolding. The Court, therefore, held that “there is no question that his injuries were at least partially attributable to defendant’s failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law

§ 240 (1) were established” (*id.*).

Here, plaintiff testified that he fell from a permanent staircase that was in the process of being built; although the stairs had handrails, they were covered in plywood (Plaintiff tr at 62, 63; *see also* plaintiff aff, ¶¶ 12, 14). Plaintiff further stated that the staircase was the only way for him to walk to the top platform (Plaintiff tr at 68; plaintiff aff, ¶ 8). He slipped and fell on snow which was on the decking (Plaintiff tr at 57; plaintiff aff, ¶ 10). Plaintiff also testified that he slipped because the new decking was very slippery (*id.*). Plaintiff could not grab onto the handrail because it was covered in plywood (Plaintiff tr at 56; plaintiff aff, ¶ 12). Thus, plaintiff has shown that “his injuries were at least partially attributable to defendant’s failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential” (*Nunez*, 304 AD2d at 488).

Defendants have failed to raise an issue of fact as to St. Francis’s liability. Defendants’ reliance on *Reyes, supra*, is unpersuasive. In *Reyes*, the plaintiff tripped and fell as he was ascending a temporary staircase from the first floor to the second floor of a hotel (*Reyes*, 83 AD3d at 512). The top tread of the staircase was “wedged” under the concrete slab that formed the second floor (*id.*). The plaintiff’s right foot caught the the edge of the slab, causing him to fall forward onto the floor (*id.* at 513). The Court held that the plaintiff’s trip and fall was “wholly unrelated to the risk which brought about the need for the [stairs] in the first instance,” and was the result of “the usual and ordinary dangers at a construction site” (*id.* [internal quotation marks and citation omitted]). Here, in contrast, plaintiff’s accident involved an elevation-related risk; plaintiff slipped and fell as he was descending the staircase from the top platform where he was required to work, and was unable to grab onto the railing because it was

covered in plywood (Plaintiff tr at 55, 56; plaintiff aff, ¶¶ 10, 12). Moreover, contrary to defendants' position, plaintiff did not trip and fall at ground level; rather, he slipped as he was descending the staircase.

Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted as against St. Francis. The portion of defendants' cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

**B. Labor Law § 241 (6)**

Labor Law § 241 (6) provides, in relevant part, as follows:

"All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:

"6. 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, . . . shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete provision of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 503 [1993]). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also 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]). Comparative negligence is a defense to liability pursuant to section 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]). “The responsibility under Labor Law § 241 (6) ‘extends not only to the point where the . . . work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work’” (*Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005], quoting *Sergio v Benjolo N.V.*, 168 AD2d 235, 236 [1st Dept 1990]).

Here, the complaint and plaintiff’s verified bill of particulars allege violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.16, and 12 NYCRR 23-1.21 (complaint, ¶ 72; verified bill of particulars, ¶ 3). Plaintiff moves for partial summary judgment based on violations of 12 NYCRR 23-1.7 (d), (e) (1) and (2), and (f). For their part, defendants move for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim on the grounds that he has failed to allege a specific or applicable violation of Industrial Code. The court shall, therefore, only consider the disputed sections 23-1.7 (d), (e) (1) and (2), and (f).

12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) states that:

“Slipping hazards. 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”

(12 NYCRR 23-1.7 [d]).

Section 23-1.7 (d) has been held to be a sufficiently specific to support a Labor Law §

241 (6) claim (*Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998], *lv denied* 92 NY2d 819 [1999]). Courts have held that the reference in section 23-1.7 (d) to “passageways” can encompass a permanent staircase where the staircase is the sole means of access to the work site (*see Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 643 [1st Dept 2013]; *Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012]).

Moreover, courts have held that a Labor Law § 241 (6) claim based upon a violation of section 23-1.7 (d) is properly sustained where there is evidence that “someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard” (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501 [1st Dept 2011] [internal quotation marks and citation omitted]; *Temes v Columbus Ctr. LLC*, 48 AD3d 281 [1st Dept 2008]).

Here, plaintiff testified that there was no other way for him to walk from the top platform to his truck (Plaintiff tr at 68; *see also* plaintiff aff, ¶ 8), and, thus, the unfinished permanent staircase where he fell may constitute a “passageway” within the meaning of section 23-1.7 (d) (*see Harasim*, 106 AD3d at 643). In addition, plaintiff testified that he slipped on snow and the new decking which was very slippery (Plaintiff tr at 56-57; *see also* plaintiff aff, ¶ 10). Plaintiff testified that he did not recall when it snowed; however, he also stated that the expressway was clear and that he did not have any problems driving to the station in Rye (Plaintiff tr at 32). According to plaintiff, the general contractor was responsible for cleaning up snow (*id.* at 41; plaintiff aff, ¶ 17). Tortorello also testified that St. Francis was responsible for removing snow on stairs that were being constructed (Tortorello tr at 50).

In opposition to the cross motion and in reply, plaintiff submits certified weather reports

from (1) Dobbs Ferry Station, located in Ardsley, New York, (2) Bronx Station, located in Bronx, New York, and (3) Putnam Lake Station, located in Fairfield County, Connecticut (Boyle reply affirmation, exhibit A).

“Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated” (CPLR 4528; *see also Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). The court does not consider the climatological data from the Bronx and Putnam Lake Stations as dispositive of the conditions in Rye, New York (*see Duffy-Duncan v Berns & Castro*, 45 AD3d 489, 490 [1st Dept 2007] [(t)he certified climatological reports submitted by defendants, and unaccompanied by an expert opinion, were insufficient to demonstrate a lack of constructive notice inasmuch as the reports . . . were taken in neighboring counties, and are not dispositive as to the conditions at the site of plaintiff’s fall in the Bronx”]). The certified climatological records for Dobbs Ferry in Westchester County indicate that 10 inches of snow fell at that location on January 12, 2011, the day before plaintiff’s accident (Boyle reply affirmation, exhibit A). Thus, in view of this evidence and the deposition testimony, there are triable issues of fact as to whether someone on the project knew of the snow, and failed to exercise reasonable care in failing to remove it in violation of section 23-1.7 (d). Indeed, “once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]).

12 NYCRR 23-1.7 (e) (1) and (2)

12 NYCRR 23-1.7 (e) 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 [e]).

Plaintiff contends, citing *Maza v University Ave. Dev. Corp.* (13 AD3d 65 [1st Dept 2004]), that this regulation is specific and applicable since the First Department has held that snow, ice, slush, and debris are tripping hazards, and the snow on which he tripped was clearly not integral to his work. Defendants contend that this regulation is inapplicable because plaintiff did not testify that he tripped as a result of a dangerous condition.

The First Department has determined that sections 23-1.7 (e) (1) and (2) are sufficiently concrete to serve as predicates for a Labor Law § 241 (6) claim (*Smith*, 22 AD3d at 370; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 514 [1st Dept 1995]). However, as pointed out by defendants, section 23-1.7 (e) is inapplicable because plaintiff does not allege that he tripped; rather, he claims that he slipped on snow on the stairwell and the slippery decking (*see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013] [section 23-1.7 (e) (1) did not apply because the plaintiff testified that he slipped on wet plywood, and there was no evidence that he tripped]; *Harasim*, 106 AD3d at 643 [section 23-1.7 (e) (2) was inapplicable where the plaintiff slipped on a stairway in a building owned and maintained by the defendant]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541 [1st Dept 2013] [where plaintiff slipped and fell on “mud, rocks,

and water” at a construction site, “12 NYCRR 23-1.7 (e), which protects workers from *tripping* hazards, is inapplicable to the facts of this case”]).

12 NYCRR 23-1.7 (f)

Section 23-1.7 (f) states that “Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided” (12 NYCRR 23-1.7 [f]).

In moving for summary judgment, plaintiff argues that he was forced to use the stairway as the only means to access his work area on the elevated platform. In addition, plaintiff contends that there was no railing for him to grab onto to prevent his fall, and that the stairwell was covered in snow, which caused him to fall and suffer serious injury. Defendants assert that this regulation is inapplicable because plaintiff clearly stated that he slipped and fell after stepping onto the platform and did not state that he slipped as a result of the staircase or a ramp or runway. Alternatively, defendants argue that there is a question of fact as to whether the stairway caused and/or contributed to plaintiff’s accident.

Section 23-1.7 (f) has been held to be sufficiently specific to support a section 241 (6) claim (*Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]). Section 23-1.7 (f) “imposes a duty upon a defendant to provide a safe staircase, free of defects” (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [1st Dept 2010]; *cf. Murphy v American Airlines*, 277 AD2d 25, 26 [1st Dept 2000] [“(p)laintiff was not injured as a result of a defect in the staircase or debris left thereon in violation of 12 NYCRR 23-1.7 (f) . . .”]).

In this case, the court concludes that there are triable issues of fact as to whether

defendants provided a safe means of access to the upper platform where plaintiff was required to work in violation of section 23-1.7 (f) (*see Sponholz v Benderson Prop. Dev.*, 273 AD2d 791, 792 [4th Dept 2000] [finding issue of fact as to whether defendants provided a safe stairway for plaintiff to use; stairway collapsed, causing plaintiff to fall 12 to 15 feet to first floor]; *cf. McGarry*, 55 AD3d at 442 [plaintiff was entitled to partial summary judgment based on a violation of 23-1.7 (f) where he was injured on a makeshift unsecured cinder block staircase]).

In light of the above, the portion of defendants' cross motion is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) claim as based on 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (e), 12 NYCRR 23-1.16, and 12 NYCRR 23-1.21. The part of plaintiff's motion for partial summary judgment under Labor Law § 241 (6) is denied.

### **C. Labor Law § 200 and Common-Law Negligence**

Plaintiff moves for partial summary judgment under Labor Law § 200, arguing that defendants should have known about the snow and remedied it, because: (1) St. Francis and Metro North knew that the jobsite was an open jobsite, and that inclement weather existed; (2) St. Francis was responsible for snow clean-up on the site as shown by the safety reports (Boyle affirmation in support, exhibit K); and (3) the snow on the stairwell was open and obvious as described by plaintiff and as shown in the photographs (*id.*, exhibits A, M). Additionally, plaintiff contends that defendants had substantial power and authority to control means and methods and, in fact, had a contractual obligation to do so.

In opposition to plaintiff's motion and in support of their cross motion, defendants contend that they did not possess the requisite authority, supervision or control over plaintiff's work. Defendants also maintain that they did not have any notice of the alleged hazardous

condition. In this regard, defendants point out that plaintiff could not recall when it last snowed and could not recall for how long the snow was present on the site. According to defendants, even if they had notice of the snow, the snow was readily observable throughout the area. Moreover, defendants argue that plaintiff was comparatively negligent in traversing through the snow.

In response to defendants' cross motion and in reply, plaintiff relies on the certified climatological data from Dobbs Ferry Station, Bronx Station, and Putnam Lake Station (Boyle reply affirmation, exhibit A).

Labor Law § 200 (1) provides as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.”

It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

“Liability pursuant to Labor Law § 200 may fall into two broad categories: workers ‘injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed’” (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). The statute is governed by the “generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason” (*Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco*

*Concrete Constr. Corp.*, 9 AD2d 379, 382 [1st Dept 1959]).

As for the first category involving dangerous or defective premises conditions, “a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Gory*, 113 AD3d at 551). Similarly, a general contractor may be liable under section 200 and the common law if it had “control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff’s injury” (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]).

With respect to the second category of cases where the worker is injured as a result of the manner in which the work is performed, “liability for common-law negligence or under Labor Law § 200 may be imposed against an owner or general contractor if it ‘actually exercised supervisory control over the injury-producing work’” (*Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014], quoting *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Here, plaintiff’s accident arose out of a dangerous condition on the stairwell, i.e., the snow on the stairs and the slippery decking, and not the manner in which his work was performed. Thus, “whether [defendants] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims” (*Seda v Epstein*, 72 AD3d 455 [1st Dept 2010]).

“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]). A general awareness that a dangerous condition may be present is legally insufficient to constitute constructive notice of the particular condition (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Here, plaintiff testified that he slipped on snow and the new decking which was very slippery (Plaintiff tr 56-57; *see also* plaintiff aff, ¶ 10). Plaintiff testified that he did not recall when it snowed; however, he also stated that the expressway was clear and that he did not have any problems driving to the station in Rye (Plaintiff tr at 32). According to plaintiff, the general contractor was responsible for cleaning up snow (Plaintiff tr at 41; plaintiff aff, ¶ 17). Tortorello also testified that St. Francis was responsible for removing snow on stairs that were being constructed (Tortorello tr at 50). The certified climatological records for Dobbs Ferry in Westchester County indicate that 10 inches of snow fell at that location on January 12, 2011, the day before plaintiff's accident (Boyle reply affirmation, exhibit A). Metro North and St. Francis employees were present on the job site on a daily basis (Tortorello tr at 14, 27). Viewing the evidence in the light most favorable to plaintiff, and drawing all reasonable inferences in his favor, there are triable issues of fact as to whether defendants had actual or constructive notice of the snow that caused plaintiff's accident (*see Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]; *Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]).

Even if the snow was open and obvious, defendants would not be entitled to summary judgment on this basis. The duty under Labor Law § 200 does not extend to "defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age,

intelligence, and experience of the servant” (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963] [internal quotation marks and citation omitted]). However, these circumstances merely “negate[] any duty that defendant [] . . . owed plaintiff to *warn* of potentially dangerous conditions” (*England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124 [3d Dept 2005] [emphasis supplied and citation omitted]; *see also Maza*, 13 AD3d at 65 [liability under section 200 is not negated by “open and obvious” nature of hazard; rather, this factor goes to plaintiff’s comparative negligence]).

Therefore, the branch of plaintiff’s motion for partial summary judgment under Labor Law § 200, and the branch of defendants’ cross motion for summary judgment dismissing Labor Law § 200 and common-law negligence, are denied.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 002) of plaintiff for partial summary judgment is granted to the extent of granting him partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant St. Francis Construction Co., and is otherwise denied; and it is further

ORDERED that the cross motion of defendants Metropolitan Transportation Authority, MTA Capital Construction, MTA Metro North Railroad, and St. Francis Construction Co. for summary judgment dismissing the complaint is granted to the extent of dismissing plaintiff’s Labor Law § 241 (6) claim insofar as it is predicated on violations of 12 NYCRR 23-1.5, 12

NYCRR 23-1.7 (e), 12 NYCRR 23-1.16, and 12 NYCRR 23-1.21, and is otherwise denied.

Dated: 6/9/14

ENTER:

  
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J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**

JUN 11 2014

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