

Massa v Eleventh Ave., L.P.

2014 NY Slip Op 31782(U)

July 8, 2014

Supreme Court, New York County

Docket Number: 103649/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

THOMAS MASSA,

Plaintiff,

INDEX NO. 103649/09

-against-

MOTION SEQ. NO. 004

ELEVENTH AVENUE, L.P., JEFFREY E. LEVINE
FAMILY LIMITED PARTNERSHIP, DD 11TH AVENUE,
LLC, TOTAL SAFETY CONSULTING, LLC, J.E. LEVINE
BUILDER INC., d/b/a LEVINE BUILDERS, S.J.
ELECTRIC, INC., STAR-DELTA ELECTRIC, LLC and
PAR PLUMBING CO.,

Defendants.

FILED
JUL 1 1 2014
NEW YORK
COUNTY CLERKS OFFICE

The following papers were read on this motion by defendants for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits (Memo) _____	_____
Replying Affidavits (Reply Memo) _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

This is an action to recover damages for personal injuries sustained by a laborer on August 27, 2008, when he tripped and fell over some electrical pipe protruding up from a poured concrete floor while working at a construction site located at 312 Eleventh Avenue, New York, New York (the premises).

Defendants Eleventh Avenue, L.P. (Eleventh), Jeffrey E. Levine Family Limited Partnership (Levine Family), DD 11th Avenue, LLC (DD 11th), Total Safety Consulting, LLC (Total Safety), J.E. Levine Builder Inc. d/b/a Levine Builders (Levine Builders) and Par Plumbing Co. (Par Plumbing) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Thomas Massa's complaint, as well as all cross-claims asserted

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against them. Defendant S.J. Electric, Inc. (SJ Electric) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against it.

BACKGROUND

On the day of the accident, Eleventh was the ground lessor on a 99-year ground lease for the premises, and DD 11th was the ground lessee. Levine Builders served as construction manager at the premises on a project which involved the new construction of a 34-story building with 368 residential units, a parking garage and retail space. Levine Builders hired nonparty Cross County Construction LLC (Cross County), plaintiff's employer, to perform superstructure concrete work at the premises. In addition, Levine hired Total Safety to serve as a safety consultant on the project, Par Plumbing to provide new plumbing installations and SJ Electric to perform electric and fire alarm work on the project. Levine Family had no ownership interest, management function or other involvement with the premises on the day of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident he was employed by Cross County as a general laborer. Plaintiff explained that his job at the site was to bring the carpenters working on the project any tools or materials needed to perform their work. Plaintiff testified that he received all his supervision, instructions and directions from either one of the Cross County foremen or the owner of the premises.

Plaintiff testified that his accident occurred while he was working on the second floor of the premises. At this time, electricians and plumbers were also working on the second floor. As he was walking to a gang ladder on his way to pass up to other workers the three 2x4s he was carrying on his right shoulder, he tripped and fell over four aluminum electrical pipes, which were held together in the middle by a brace, and which protruded approximately two feet up from the concrete floor (the stub-up). Each pipe was gray in color and approximately a half of an inch in diameter. Plaintiff maintained that there were no cones or warnings in place to warn

of the stub-up's presence, and that the stub-up had been present in the accident area for between a week and a month prior to the time of the accident.

Plaintiff further testified that he recognized the stub-up to be an electrical conduit from his experience in working in the construction industry. These types of conduits, which were common at the site, were used by the electricians on the project to run wires. Plaintiff, who had general knowledge that various stub-ups were present on the floor, was looking "forward, because all these guys were working on the floors, and [he] didn't want to hit anybody" (SJ Electric's opposition, exhibit A, plaintiff's tr at 102).

Deposition Testimony of Anthony Rappa, SJ Electric's General Superintendent

Anthony Rappa (Rappa) testified that he served as SJ Electric's general superintendent on the project. SJ Electric was hired by Levine Builders to install the electrical wiring, conduits and power sources for the building. Rappa testified that low voltage wiring for the project was performed by a different electrical contractor on the project. At the time of the accident, and prior to the concrete pours, SJ Electric, the plumbers and the steamfitters on the project all installed conduits in the building's floors. Rappa explained that the conduits, or cylinder sleeves, installed by SJ Electric, were never made of aluminum, but rather, they were made of electro-magnetic tubing, galvanized steel or plastic.

Rappa testified that he typically avoided using stub-ups, which protrude upwards from the concrete floor, because they were susceptible to damage during construction. For this reason, Rappa preferred to use stub-downs, which were conduits which ran down from the ceiling. When it did become necessary to use a stub-up, SJ Electric installed them so that they only protruded six to seven inches from the floor.

During his deposition, and after reviewing the building's construction plans, Rappa

testified that, while he could identify a stub-up installed on the second floor, it was concealed in a wall, and thus, it was not a tripping hazard. Rappa also testified that, in the event that any of SJ Electric's conduits did protrude up from the surface of the floor, "[m]y guys go around and spray everyone of my [stub-ups] orange, so that there is no damage [to them]" (SJ Electric's opposition, exhibit B, Rappa tr at 65).

Deposition Testimony of Patrick Cannone, SJ Electric Worker

Patrick Cannone (Cannone) testified that he was employed by SJ Electric as an electrician on the day of the accident. Cannone explained that SJ Electric used an assortment of conduit on the project, such as "[g]alvanized pipe, aluminum pipe, EMT and plastic" (SJ Electric's opposition, exhibit C, Cannone tr at 16). He explained that approximately 85 %, or the "majority" of SJ Electric's conduits, are stub-downs (*id.* at 20). He noted that SJ Electric would only use aluminum conduits for outdoor purposes, where the use of the metal was necessary to protect the conduits against the weather. Cannone asserted that "[SJ Electric] never install[ed] it in concrete . . . we used plastic pipe for that" (*id.* at 27-28).

Deposition Testimony of James Stankes, SJ Electric Worker

James Stankes (Stankes) testified that he was employed as a worker by SJ Electric on the day of the accident. His duties included installing pipes and cables for the electrical work at the premises. He explained that SJ Electric "ran conduits for the feeds for the panels" (SJ Electric opposition, exhibit D, Stankes tr at 10). He described the types of conduit used by SJ Electric as sometimes including "three-quarter to four-inch EMT aluminum," as well as electro-magnetic tubing and galvanized steel (*id.*). He testified that the only stub-ups coming out of the floor on the second floor of the building on the day of the accident were located against a sheer wall behind an elevator shaft, and therefore, they were not tripping hazards. He maintained that

tripping hazards at the site were usually sprayed red by either the general contractor or SJ Electric in order to make them more visible to workers.

Deposition Testimony of Riso Ramusevic, Employed by LBDD Resource Inc.

Riso Ramusevic (Ramusevic) testified that he was employed by nonparty LBDD Resource Inc. (LBDD) on the day of the accident. LBDD was hired by Levine Builders to provide risk management and safety consulting services to Levine Builders. Ramusevic testified that stub-ups were used by SJ Electric, as well as steamfitters, control electricians, plumbers and HVAC subcontractors at the project. Ramusevic explained that the installation of a stub-up or conduit is an integral part of construction "just like a wall is" (SJ Electric's opposition, exhibit E, Ramusevic tr at 43). He further explained that stub-ups are "basically a sleeve that would act as a conduit to travel through floors whether its piping or electrical wires" *id.* at 31). The stub-ups are sometimes spray-painted for safety reasons. Ramusevic testified that, depending on the contract requirements, "sometimes . . . the trade contractors would [spray the stub-ups]," as they "are responsible for their means and method with respect to safety" (*id.* at 43, 45).

Deposition Testimony of Fred Milteer, Total Safety Construction Site Safety Manager

Fred Milteer (Milteer) testified that he was a construction site safety manager employed by Total Safety on the day of the accident. As site safety manager, Milteer inspected the floors of the premises each day. In August of 2008, the floors of the building were still wide open, as no interior walls had yet been built. Milteer testified that, if he had observed a tripping hazard, he would have noted it in his daily report, and that the report from the day of the accident did not advise of any tripping hazards on the second floor of the building. He also noted that the pipes on each floor ran close to the walls, and thus, they did not pose a tripping hazard. In any

event, if there were a conduit coming up from the floor, it was often surrounded by rebar or they would be spray-painted orange to make them more visible to the workers.

Deposition Testimony of Lawrence Frawley, Par Plumbing Supervisor

Lawrence Frawley (Frawley) testified that he served as Par Plumbing's supervisor for new construction on the day of the accident. As such, he "check[ed] the projects daily" (defendants' notice of motion, exhibit I, Frawley tr at 8). Par Plumbing's role at the project was to "install all new plumbing systems" (*id.* at 10). Prior to the day of the accident, with the exception of Par Plumbing's installation of temporary copper pipes for water, Par Plumbing had not yet installed any pipes on the second floor of the premises. However, several weeks before the deck of the second floor was completed, and prior to Par Plumbing's installation of its pipes, Par Plumbing placed sleeves in the deck, "[s]o a pipe can pass through [them]" (*id.* at 17). Frawley maintained that Par Plumbing did not use any aluminum pipes on the project. The only trade that used aluminum pipes was the electrical trade.

Deposition Testimony of James Costigan, Supervisor for Cross County

James Costigan (Costigan) testified that he was one of plaintiff's Cross County supervisors on the day of the accident. Costigan testified that SJ Electric was the electrical subcontractor on the project, and that he observed SJ Electric installing conduits in the floors of the building. When asked to describe the kind of pipes that SJ Electric used on the project, Costigan described them as "rigid metal pipe that they install on the floor, and sometimes they come out of the floor, so they could run wires through those pipes" (defendants' notice of motion, exhibit L, Costigan tr at 11). He also described said pipes as ranging from three-quarters of an inch in diameter to four-inches in diameter, protruding approximately 12 inches from the surface of the floor. Costigan maintained that plaintiff tripped over metal colored

pipes.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "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]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Labor Law § 241(6) Claim Against Defendants and SJ Electric

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

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7(e)(1) and (2), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] ["Indeed, plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendants' summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed

abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants and SJ Electric are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on those abandoned provisions.

Initially, Eleventh Avenue, as owner of the premises, may be subjected to Labor Law § 241(6) liability. However, it must be determined as to whether Levine Builders, Levine Family, DD 11th, Total Safety, Par Plumbing and SJ Electric may be vicariously liable for plaintiff's injuries under Labor Law § 241(6) as agents of the owner. "When the work giving rise to [the duty to conform to the requirements of Labor Law § 241(6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Initially, a review of the facts in this case indicates that Levine Builders, Levine Family, DD 11th and Total Safety did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the installation of the stub-up, so as to be held vicariously liable for plaintiff's injuries as a statutory agent of the owner under Labor Law ' 241(6) (see *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [Court noted that defendant Turner was not a typical construction manager, because it had "broad responsibility" as a "coordinator and overall supervisor for all the work being performed on the job site," including the plaintiff's work]). Thus, these defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim against them.

As to Par Plumbing, testimonial evidence in the record suggests that the plumbers and steamfitters on the project, which were present on the second floor at the time of the accident, also installed conduits and piping in the floors of the building. Frawley, the Par Plumbing

supervisor, testified that several weeks before the deck of the second floor was completed, and prior to Par Plumbing's installation of its pipes, Par Plumbing placed sleeves in the deck, "[s]o a pipe can pass through [them]" (defendants' notice of motion, exhibit I, Frawley tr at 17). Thus, a question of fact exists as to whether Par Plumbing's conduit caused plaintiff to trip and fall (defendants' notice of motion, exhibit I, Frawley tr at 17).

In addition, the conflicting testimony in the record regarding the heights and locations of SJ Electric's stub-ups at the site, as well as the material they were comprised of, creates a question of fact as to whether SJ Electric was the entity responsible for installing the stub-up that caused the accident. Thus, as questions of fact exist as to whether Par Plumbing and/or SJ Electric supervised and controlled the injury-producing work, these defendants are not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.7(e)(1) and (2) on the ground that they were not an agent of the owner for the purposes of the statute.

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

Industrial Code 12 NYCRR 23-1.7(e)(1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241 (6) (see *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]; *Vieira v Tishman Constr. Corp.*, 255 AD2d 235, 235 [1st Dept 1998]).

Industrial Code 12 NYCRR 23-1.7(e)(1) and (2) provide, in pertinent part:

(e) Tripping and other hazards

- (1) Passageways. All passageways shall be kept free from . . . debris and from any other obstructions or conditions which could cause tripping.

* * *

- (2) Working Areas. The parts of floors, platforms and similar areas

where persons work or pass shall be kept free from . . . debris . . .
insofar as may be consistent with the work being performed.

Here, Industrial Code 12 NYCRR 23-1.7(e)(1) does not apply to the facts of this case, as plaintiff's accident did not occur in a passageway, but in an open working area (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dept 2007]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d at 225-226; *Appelbaum v 100 Church*, 6 AD3d at 310; *Vieira v Tishman Constr. Corp.*, 255 AD2d at 235 [no Industrial Code 12 NYCRR 23-1.7(e)(1) violation where plaintiff was not injured in a passageway but while working in an open area]).

To that effect, a review of the testimonial evidence in this case reveals that the floors of the building on the day of the accident were still wide open, as no interior walls had yet been built. In his opposition to defendants' motion, and in support of his argument that a question of fact exists as to whether the location where he was injured was a passageway, plaintiff puts forth only the following testimony:

Q. Was there a specific path that you were walking along? How was the floor laid out?

A. I don't know. It's just an opening of the building, just walk into it

(plaintiff's notice of cross-motion, exhibit, plaintiff's tr at 35). However, a further reading of plaintiff's testimony reveals that plaintiff continued his testimony, as follows:

Q. The second floor, were there walls up?

A. No walls, no.

Q. So the entire second floor was open. Could you see from one end of the second floor to the other end of the second floor?

A. That's straight, but there might be a wall in the middle, but there was no wall on the outside of the building (*id.* at 35-36).

In addition, while plaintiff's accident occurred in a working area, as required by Industrial

Code 12 NYCRR 23-1.7(e)(2), this section is inapplicable to the facts of this case, as the stub-up that plaintiff allegedly tripped on was an integral part of the work being performed at the site of his accident (*O'Sullivan v IDI Constr. Co.*, 7 NY3d 805, 805 [2006] [electrical pipe or conduit that plaintiff tripped over was an integral part of the construction]; *Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 465 [1st Dept 2013] [section 23-1.7(e)(2) did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work being performed in the room]; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d at 1157 [electrical conduits, which were protruding from the concrete floor of a building under construction and that the plaintiff tripped over, were integral part of the construction going on at the project site]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, it was an integral part of the work being performed]; *Dubin v S. DiFazio & Sons Constr., Inc.*, 34 AD3d 626, 626 [2d Dept 2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7(e)(2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed]; *Bond v York Hunter Constr.*, 270 AD2d 112, 113 [1st Dept 2000], *affd* 95 NY2d 883 [2000] ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]; *Vieira v Tishman Constr. Corp.*, 255 AD2d at 235 [section 23-1.7(e)(2) did not apply where the plaintiff tripped over wire mesh installed on top of a metal grid, where mesh became part of the structure of the floor once the concrete was poured on top of it]). As stated by Ramusevic, the installation of conduit is an integral part of construction "just like a wall is" (SJ Electric's opposition, exhibit E,

Ramusevic tr at 43).

Thus, defendants and SJ Electric are entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241(6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-1.7(e)(1) and (2).

Plaintiff's Common-law Negligence and Labor Law § 200 Claims

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; see also *Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid and correct an unsafe condition*'" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998], quoting *Russin v Picciano & Son*, 54 NY2d at 317). Labor Law § 200(1) states, in pertinent part, as follows:

"1. 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.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (see *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

The accident at issue in this case was caused due to an unsafe condition at the premises constituting a tripping hazard, i.e., the presence of the stub-up, which protruded up

from the surface of the floor, and which was not marked in such a way as to warn of its presence. "Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]). Therefore, in order for defendants to be liable under common-law negligence and Labor Law § 200 theories, it must be shown that defendants either created the alleged unsafe condition by installing the stub-up and then failing to mark it in such a way as to warn of its presence, or that they had actual or constructive notice of the unsafe condition.

Initially, Levine Family is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it, because it has not been disputed that it had no ownership interest, management function or other involvement with the premises on the day of the accident. In addition, as discussed previously, as questions of fact exist as to whether defendant Par Plumbing or defendant SJ Electric created the alleged unsafe condition, these defendants are not entitled to summary judgement dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them (see *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 144; *Murphy v Columbia Univ.*, 4 AD3d at 202).

As to the remaining defendants, Eleventh, DD 11th, Total Safety and Levine Builders, the record is devoid of any evidence that these defendants either created or had actual notice of the stub-up's presence in the accident area, such that they could be charged with the

responsibility to mark it so as to make it safe for workers. However, a question of fact exists as to whether these defendants had constructive notice of the unsafe condition. The Court of Appeals has long held that “[t]o 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]).

Witnesses for defendants and SJ Electric testified that most of its conduits at the premises were stub-downs which were installed within or near walls, and thus, they were not tripping hazards. In addition, Milteer of Total Safety testified that he inspected the floors of the premises each day, and that if he had noticed a tripping hazard, he would have included it in his report, which he did not. However, as put forth by plaintiff in support of his argument that defendants should be charged with constructive notice, plaintiff testified that the stub-up that he tripped over was in place approximately one week to one month before the date of plaintiff’s accident, ample time for defendants to discover and remedy it. In addition, the record contains testimony to the effect that it was sometimes necessary for stub-ups to be installed in working areas.

Thus, as a question of fact exists as to whether these defendants had constructive notice of the unsafe condition, they are not entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims against them.

Finally, it should be noted that defendants argue that, due to the open and obvious nature of the unsafe condition at issue in this case, the duty to provide a safe place to work does not apply. However, liability under Labor Law § 200 is not negated by plaintiff’s awareness that the stub-up may have been present at the location of his accident, or by the

open and obvious nature of this allegedly unsafe condition, as these factors merely go to plaintiff's comparative negligence (*DeJesus v F.J. Sciame Constr. Co., Inc.*, 20 AD3d 354, 354 [1st Dept 2005] [although raised metal door frame on which plaintiff tripped was open, obvious and readily observable, this fact only eliminated the defendant contractor's duty to warn of the hazardous condition and did not negate the broader duty to maintain the workplace in a safe condition]; *Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 65 [1st Dept 2004] [where laborer sustained injuries when he tripped over debris and snow and ice in a courtyard at a construction site, liability under section 200 was not negated by plaintiff's awareness that workers were throwing debris in the courtyard, or by the open and obvious nature of the danger; rather, those factors went to plaintiff's comparative negligence]; *Sportiello v City of New York*, 6 AD3d 421, 422 [2d Dept 2004]).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the part of the motion of defendants Eleventh Avenue, L.P., Jeffrey E. Levine Family Limited Partnership (Levine Family), DD 11th Avenue, LLC, Total Safety Consulting, LLC, J.E. Levine Builder Inc. d/b/a Levine Builders and Par Plumbing Co.'s (collectively, defendants), pursuant to CPLR 3212, for summary judgment dismissing plaintiff Thomas Massa's complaint in its entirety, as well as all cross-claims, as against defendant Levine Family is granted, and the complaint and cross-claims are dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly, in favor of said defendant; and it is further,

ORDERED that the part of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against them is granted, and this claim

is severed and dismissed as to these defendants, and the motion is otherwise denied; and it is further,

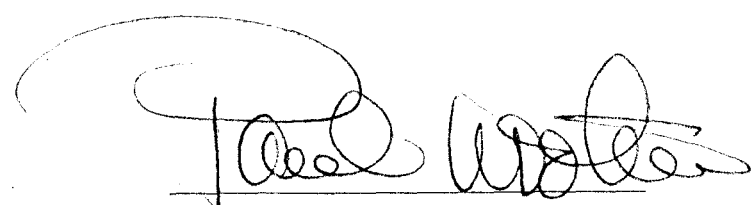
ORDERED that the part of defendant S.J. Electric's cross-motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against it is granted, and this claim is severed and dismissed as to this defendant, and the motion is otherwise denied; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 7-8-14


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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JUL 11 2014
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