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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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ROBERT HUGHES,

Plaintiff,

-against-

DECISION & ORDER
Index No. 156857/13

CHELSEA 20TH STREET DEVELOPMENT, LLC, THE BRODSKY ORGANIZATION, RYDER CONSTRUCTION, INC. and JM3 CONSTRUCTION, LLC,

Defendants.

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JOAN M. KENNEY, J.S.C.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

This action arises out of a construction site accident that occurred on February 27, 2013 at 455 West 20th Street in Manhattan. Plaintiff Robert Hughes alleges that he slipped and fell on a makeshift ramp while walking to the temporary restrooms on the site. Defendants Chelsea 20th St. Development, LLC (Chelsea), The Brodsky Organization (Brodsky), and Ryder Construction, Inc. (Ryder) (collectively, the Chelsea defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 and common-law negligence claims as against them (motion sequence number 003).

Defendant JM3 Construction, LLC (JM3) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against it (motion sequence number 004).

BACKGROUND

The construction project was comprised of the renovation and rehabilitation of the West Building and the construction of the Tennis Building. The project was owned by Chelsea and developed by Brodsky. Ryder was hired as the general contractor on the project. Ryder retained

JM3 as the carpentry subcontractor in connection with the construction of the Tennis Building. Plaintiff's employer, LS Steel, was hired to perform various types of steel work in the West Building.

Plaintiff testified that he was employed as an ironworker by LS Steel on the date of his accident, and had begun working on the job the year before (Plaintiff EBT at 28-29). In February 2013, the project was in the demolition stage (*id.* at 29). Plaintiff testified that, on the date of his accident, he arrived at the job site "[a] little before 7:00 [a.m.]" (*id.* at 50). According to plaintiff, it started to rain a little by the time he got there (*id.* at 50-51). Plaintiff was working in the basement that morning, performing structural steel work for the I-beam columns (*id.* at 54). There were carpenters working there that day (*id.* at 51). Plaintiff testified that the weather deteriorated during the course of the morning (*id.* at 55). Plaintiff stated that he had an accident at about 11:00 a.m. in the back of the building (*id.* at 56).

As plaintiff was in the front of the building, he "checked out what the guys were doing on the first floor" (*id.* at 57). Plaintiff "came out of the building, walked around the back of it heading towards the bathrooms" (*id.* at 58). He stated that "[t]here was a ramp there which [he] proceeded to go up and that's where [he] fell" (*id.* at 59). Plaintiff stated that he always took the same route to go to the temporary restrooms by walking over the planks, and "[t]hat was the way everybody went" (*id.* at 83, 97). The ramp was made of scaffolding planks, two planks side by side, maybe a foot wide (*id.* at 62, 63). Before plaintiff stepped on the planks, he observed that "[t]here was water on them from the rain. There was debris on them from, [he] guess[es], the trades working, like mud, whatever they were doing to the side of the building, grouting or whatever they were doing, it spilled down onto the sidewalk and onto the ramp" (*id.* at 65-66, 73-74). Plaintiff stated that he believed that the mud was "from the trades that were working on the building itself" (*id.* at 66). Plaintiff

indicated that there were workers on the side of the building "restoring the granite that was on the side of the building"; however, plaintiff did not see them drop anything onto the planks (*id.* at 67). Plaintiff testified that he "can't be sure what it was, mud or grout, whatever they were using," and that his right foot "went forward" when he stepped on the mud and water (*id.* at 78). According to plaintiff, his "foot gave out," causing him to fall on the plank on his back, and then roll over to the left onto the concrete (*id.* at 75).

Thomas Vita (Vita), Ryder's project manager, testified that his log book for February 27, 2013 indicated that it rained that day (Vita EBT at 8, 36; Sachs affirmation in opposition, exhibit A). Vita testified that the area of the construction site was uncovered and exposed to the elements (*id.* at 70, 72). The planks over the pipe were set up as a ramp, and there were no anti-slip treads on the ramp (*id.* at 74-76). Vita stated that there was no railing along the planks (*id.* at 119). Vita testified that he did not receive any complaints about the planks prior to February 27, 2013 (*id.* at 80).

Plaintiff's amended complaint seeks recovery under Labor Law §§ 240 (1), 241 (6), 200 and for common-law negligence.

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, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

A. Chelsea Defendants' Motion for Summary Judgment (Motion Sequence No. 003)

1. Labor Law § 240 (1)

Plaintiff did not oppose dismissal of his Labor Law § 240 (1) claim against the Chelsea defendants. Therefore, plaintiff's Labor Law § 240 (1) claim is dismissed against these defendants.

2. Labor Law § 241 (6)

Labor Law § 241 requires that all contractors, owners, and their agents comply with the following requirement:

> "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, 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) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). 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 (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). Comparative negligence is a defense to liability pursuant to section 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483, 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, 370-371 [1st Dept 2005], quoting *Sergio v Benjolo N.V.*, 168 AD2d 235, 236 [1st Dept 1990]).

Plaintiff's supplemental bill of particulars allege violations of 12 NYCRR 23-1.7; 12 NYCRR 23-1.15; 12 NYCRR 23-1.22; 12 NYCRR 23-1.23; 12 NYCRR 23-2.1; and 12 NYCRR 23-4 (supplemental verified bill of particulars, ¶ 7). Since plaintiff relies only on sections 23-1.7 (d) and 23-2.1 (b) in opposition, the court shall solely consider these alleged Industrial Code violations (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal"]).

12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) provides as follows:

> "(d) 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]).

The Chelsea defendants argue that: (1) plaintiff cannot affirmatively establish what it was that he allegedly slipped on while traversing the ramp, as he can only "guess" that it may have been the mud, wetness, debris, grout or cement; and (2) they had no actual or constructive notice of these conditions.

Plaintiff argues, in opposition, that he has sufficiently identified the cause of his fall, and that defendants violated section 23-1.7 (d) because the planks were wet, and had mud or construction debris on them. Plaintiff submits an expert affidavit from Scott Silberman, a professional engineer, indicating that ramps become especially slippery when they become wet, and that defendants violated the provision by failing to cover the ramp or by failing to remove the water, mud or debris (Silberman aff, ¶¶ 7, 10, 11). According to plaintiff, it had rained for approximately four hours prior to the accident.

Section 23-1.7 (d) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 378 [2d Dept 2006]; *Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998], *lv denied* 92 NY2d 819 [1999]).

Moreover, courts have held that a section 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"[1] (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 501 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also O'Brien v Port Auth. of N.Y. & N.J.*, 131 AD3d 823, 825 [1st Dept 2015]; *Temes v Columbus Ctr. LLC*, 48 AD3d 281, 281 [1st Dept 2008]). In *Booth*, the plaintiff tripped on an object covered by snow and ice (*Booth*, 82 AD3d at 501). The First Department held that the plaintiff's accident occurred on a floor, platform or other working surface within the meaning of section 23-1.7 (d), and that "[t]he evidence that plaintiff slipped on snow and ice raises a triable issue as to whether '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'" (*id.*). The Court explained that:

> "[b]ecause plaintiff's accident occurred almost seven hours after the snow began and several hours after other workers were on the premises, there are triable issues as to whether someone within the chain of construction knew about the presence of snow and ice and acted negligently in failing to remove it, or at least rope off the dangerous areas, prior to the accident . . . . It is enough that employees were on site for an extended period before plaintiff's accident, and that it was snowing for a sufficient time to provide the required notice" (*id.*).

Here, it is uncontested that the ramp may constitute a "passageway" within the meaning of section 23-1.7 (d), and that plaintiff was not injured in an open, common area (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008] [ramp constituted a "passageway" where it was used to gain access to employer's shanty]; *cf. Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012] ["open, unpaved area where plaintiff was walking when he fell was not 'a floor, passageway, walkway, scaffold, platform or other elevated working surface,' within

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[1]As noted by the Pattern Jury Instructions, "[i]t would appear that notice to someone in the construction chain may be a relevant element where the hazard causing the accident was not created by the construction work" (NY PJI 2:216A).

the purview of 12 NYCRR 23–1.7 (d)"]).

The court rejects the Chelsea defendants' contention that plaintiff merely offers speculation as to the cause of his accident. "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (*Steinsvaag v City of New York*, 96 AD3d 932, 933 [2d Dept 2012] [internal quotation marks and citation omitted]). "[The] proof must permit a finding of proximate cause 'based not upon speculation, but upon the logical inferences to be drawn from the evidence'" (*Flores v City of New York*, 29 AD3d 356, 358 [1st Dept 2006], quoting *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]).

In this case, there is sufficient circumstantial evidence as to the cause of plaintiff's fall. Plaintiff described the planks as wet and "dirty" and with "concrete and debris on them," that he did not know "exactly what it was," "[i]t was mud or whatever they were using" (Plaintiff EBT at 77). Although plaintiff stated that he stepped in "[he] guess[es] the mud that was on the ramp and the water" and that he "can't be sure what it was, mud or grout," and that he slipped because he "guess[ed] it was wet," he later stated that his right foot "slipped out" and "went forward" when he stepped on the mud and water (*id.* at 78, 215-216).

Furthermore, contrary to the Chelsea defendants' contention, there are triable issues of fact as to whether "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*, 82 AD3d at 501 [internal quotation marks citation omitted]). Given the evidence that it had been raining for approximately four hours prior to the accident, plaintiff's testimony that he slipped on

mud or water on the planks, that the ramp was commonly used by workers to access the temporary restrooms, and that plaintiff had previously seen debris on the planks (Plaintiff EBT at 50-51, 56, 76-78, 97, 215-216, 235-236), there are triable issues of fact as to whether someone within the construction chain had notice of the hazards that caused him to fall (*see Booth*, 82 AD3d at 501; *Temes*, 48 AD3d at 281 [evidence that plaintiff slipped on a patch of ice obscured by construction debris raised a triable issue as to whether "someone within the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard"] [internal quotation marks and citation omitted]).

DeStefano v Amtad N.Y. (269 AD2d 229 [1st Dept 2000]), a case relied upon by the Chelsea defendants, is distinguishable. In that case, the plaintiff, an electrician, was assigned to turn on the power at the construction site before the other trades arrived, and was the first person to enter the site on the morning of the accident (*id.*). The First Department held that the plaintiff "ha[d] no cause of action under Labor Law § 241 (6) and 12 NYCRR 23-1.7 (d) absent any evidence tending to show that 'someone within the chain of the construction project' had notice of the overnight accumulation of snow on the ramp on which he slipped" (*id.*). In this case, plaintiff was not the only worker present on the site, and there is evidence that the conditions existed for a sufficient period of time for them to be remedied.

Accordingly, plaintiff has identified a specific and applicable violation of Industrial Code § 23-1.7 (d). Thus, "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*, 91 NY2d at 350).

12 NYCRR 23-2.1 (b)

Section 23-2.1 (b) provides that "[d]ebris shall be handled and disposed of by methods that

will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area" (12 NYCRR 23-2.1 [b]). However, the First Department has held that section 23-2.1 (b) is insufficiently specific to support a section 241 (6) claim (*see Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007]; *Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]; *Lynch v Abax, Inc.*, 268 AD2d 366, 367 [1st Dept 2000]).[2]

Therefore, plaintiff may proceed on his Labor Law § 241 (6) claim to the extent that it is predicated on a violation of section 23-1.7 (d).

3. Labor Law § 200 and Common-Law Negligence

The Chelsea defendants argue that plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed because: (1) plaintiff cannot identify what caused him to fall; (2) the wet ramp does not constitute a dangerous condition; and (3) even if plaintiff fell because of one of the other alleged conditions on the planks (i.e., the debris, mud, cement, grout), they did not create or have notice of these conditions.

In response, plaintiff contends that he has sufficiently identified the cause of his fall, and that there is an issue of fact as to whether the Chelsea defendants had constructive notice of the wet ramp with mud and construction debris. Plaintiff asserts that the ramp was exposed to rain for at least 4 hours before the accident. In addition, according to plaintiff, the evidence supports his claim that the mud and construction debris was on the ramp for a significant period of time before the accident took place.

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[2]The court notes that the Fourth Department has held section 23-2.1 (b) to be sufficiently specific (*see Matter of Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 1543 [4th Dept 2015]). However, this court is bound by First Department precedent (*see Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

Labor Law § 200 (1) provides that:

> "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 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 persons. The board may make rules to carry into effect the provisions of this section."

Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*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]).

Where the worker is injured as a result of the manner in which the work is performed, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

By contrast, where the worker's injury stems from a dangerous or defective premises condition, "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]). 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]).

The parties agree that plaintiff's accident arose out of a dangerous premises condition, and not out of the means and methods of the work performed.

"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]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

Although the Chelsea defendants argue that plaintiff only offers speculation as to what caused him to fall, as discussed previously, there is sufficient circumstantial evidence as to the conditions that caused him to fall.

Moreover, in light of the evidence that it had been raining for about four hours before plaintiff's accident, and that plaintiff slipped in the mud or water on the planks (Plaintiff EBT at 50-51, 56, 76-78), there are triable issues of fact as to whether the Chelsea defendants had actual or constructive notice of these conditions (*see Cerverizzo v City of New York*, 116 AD3d 469, 471 [1st Dept 2014]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [1st Dept 2005]). A reasonable jury could conclude that these defendants should have been aware of this potentially dangerous condition. Therefore, the branch of the Chelsea defendants' motion seeking dismissal of plaintiff's Labor Law § 200 and

common-law negligence claims is denied.

B. JM3's Motion for Summary Judgment (Motion Sequence No. 004)

JM3 argues that it cannot be liable under the Labor Law. Plaintiff and the Chelsea defendants did not oppose the motion.[3] It is undisputed that JM3 is not an owner or a general contractor. Thus, JM3 can only be liable as a statutory agent of Chelsea or Ryder.

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties 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. 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"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [citations omitted]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

Here, there is no evidence that JM3 had the authority to supervise or control plaintiff's work. JM3's foreman testified that it performed work in the Tennis Building (Marchetti EBT at 11, 12). Plaintiff testified that he received all of his supervision from his supervisor at LS Steel (Plaintiff EBT at 205-206). Plaintiff was injured near the rear of the West Building (*id.* at 61, 62, 209-213). There is also no evidence that JM3 committed an affirmative act of negligence.

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[3]JM3 submits a supplemental affirmation indicating that counsel for plaintiff signed a stipulation of discontinuance discontinuing his claims against it. However, the stipulation of discontinuance is ineffective because it was not "signed by the attorneys of record for all parties" (CPLR 3217 [a] [2]; *see also Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012]).

Therefore, JM3 is entitled to dismissal of plaintiff's complaint and all cross claims against it.

Accordingly, it is

ORDERED that the motion (sequence number 003) of defendants Chelsea 20th St. Development, LLC, The Brodsky Organization, and Ryder Construction, Inc. for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 240 (1) claim, and plaintiff's Labor Law § 241 (6) claim except as to 12 NYCRR 23-1.7 (d), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendant JM3 Construction, LLC for summary judgment is granted and the complaint is severed and dismissed against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties proceed to mediation/trial on the remaining causes of action.

Dated: January 4, 2016

ENTER:

JOAN M. KENNEY J.S.C.

J.S.C.