NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

PIARA SINGH,

Plaintiff,

-against-

114-118 DYCKMAN REALTY LLC and DYCKMAN DEALS, INC.,

Defendants.

Index No.: 101777/12
DECISION/ORDER
Motion Sequence No. 6

PIARA SINGH,

Plaintiff,

-against-

114-118 DYCKMAN REALTY LLC,

Defendant.

Index No.: 150483/15
DECISION/ORDER
Motion Sequence No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the following:

Plaintiff's Partial Summary-Judgment Motion and Defendant Dyckman Deals' Cross-Motion (sequence 6 under Index No. 101777/12).

Papers	**Numbered**
Plaintiff's Notice of Motion	1
Defendant Dyckman Deals' Affirmation in Opposition	2
Defendant Dyckman Deals' Affirmation in Opposition	3
Defendant Dyckman Deals' Notice of Cross-Motion	4
Plaintiff's Reply Affirmation in Further Support	5

Defendant 114-118 Dyckman Realty LLC's Motion to Dismiss (sequence 1 under Index No. 150483/15).

Papers	**Numbered**
Defendant's Notice of Motion	1
Plaintiff's Affirmation in Opposition	2
Defendant's Affirmation in Reply	3

A. Ali Yusaf, Esq., Richmond Hill, for plaintiff.
Baron Law Firm, PLLC, East Northport (John R. Sordi of counsel), for defendant Dyckman Deals, Inc.
Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaronof counsel), for defendant 114-118 Dyckman Realty, Inc.

Gerald Lebovits, J.

The court consolidates these cases only for disposition of the parties' respective motions given that the cases involve virtually the same parties, issues, and facts.

Plaintiff Piara Singh, a laborer, seeks to recover damages for personal injuries he sustained on January 17, 2012, when he fell down a permanent stairway while working on a construction project located at 116A Dyckman Street in New York County (the Premises).

In an action filed under Index No. 101777/12 (Action 1), plaintiff Piara Singh moves under CPLR 3212 for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant Dyckman Deals, Inc. (Dyckman Deals).

Defendant Dyckman Deals cross-moves under CPLR 3212 for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against it.[1]

In an action filed under Index No. 150483/15 (Action 2), defendant 114-118 Dyckman Realty LLC (114 Dyckman) moves under CPLR 3211 (a) (4) to dismiss plaintiff's complaint in Action 2 on the ground that a prior action is pending — Action 1 — involving the same facts, the same parties, and seeking the same redress.

BACKGROUND

On the day of the accident, Dyckman Deals was the lessee of the Premises where the accident took place. Dyckman Deals hired plaintiff's employer, nonparty Ajad Construction, Inc. (Ajad), which was owned by Kuldip Singh, to perform repair work to the floor of the basement of the Premises. The subject work entailed filling in multiple rat holes with sand and then covering the holes with concrete. The accident occurred as plaintiff was descending the steps of a stairway that led from the first floor of the Premises to the basement. It is undisputed that the stairway was the sole access to the basement where plaintiff performed his work.

Plaintiff's Deposition Testimony

Plaintiff testified that his work on the day of the accident consisted of fixing rat holes located on the basement's floor, and that his boss, Kuldip, told him "what to do" (plaintiff's January 24, 2013 tr at 30). Plaintiff described the basement floor as cracked, broken, and riddled with holes. Plaintiff explained that his job did not require him to excavate the floor, as the repair work was limited to filling in the rat holes with sand and then covering them with concrete.

[1] Defendant 114-118 Dyckman Realty LLC did not answer in Action 1 and plaintiff did not pursue a default judgment against it.

Plaintiff testified that the only way for him to access the basement work area was by an old wooden stairway, which he described as cracked, broken, and riddled with holes. In addition, the stairway lacked a proper handrail. Plaintiff testified that, when he stepped on the stairs, "they moved a little bit" (*id.* at 34). When plaintiff notified Kuldip the day before the accident that the second step from the top of the stairway was becoming "more loose" in comparison to the other steps, Kuldip told him to just keep working, as they only had a few days left on the job (*id.* at 36).

Plaintiff explained that to perform the work, plaintiff and his coworkers had to carry bags of cement mixture into the basement. Plaintiff described the components of the mixture as consisting of "[c]ement, sand, concrete" (*id.* at 63). Plaintiff noted that sometimes the concrete components of the mixture got onto the soles of the workers' shoes and was tracked around. As such, the stairway's steps were swept at the end of each day.

Plaintiff further testified that the accident occurred after lunch as he was descending the stairway. At the time of the accident, he was carrying a 35-pound bucket containing tools in his left hand and his lunch bag in his right hand. As plaintiff stepped down on the first step, he slipped on the cement mixture, which he described as "small stones" and "sand" (*id.* at 42, 56). After his feet landed on the second step, the step detached from "[t]he wooden thing which was on the [left] side [next to the wall]" (*id.* at 48). While the second step did not break, "it was [left] hanging on the left side" (*id.*).

Plaintiff explained that he was injured when he fell through the "big hole in the stairs" (*id.* at 60).[2] Plaintiff maintained that he realized that he slipped on sand for the first time only "when [he] slipped" (*id.* at 54). It was plaintiff's opinion that the sand was tracked there by store employees who frequented the basement. He also noted that the amount of sand on the stairs "was very little. It was invisible" prior to the time of the accident. However, by the time of the accident, the amount of sand on the stairway had increased (*id.* at 53).

Deposition Testimony of Shaikh Rahman

Shaikh Rahman testified that he was the manager of the 99 Cent store located within the Premises on the day of the accident. He testified that, in response to some violations that the store had received, Dyckman Deals hired Ajad to perform concrete repair work in the basement to fill in rat holes with cement and sand. He confirmed plaintiff's testimony that the only way to access the basement of the Premises was via a wooden stairway, which ran from the interior of the store. Rahman used the subject stairway at least one or two times a week.

Rahman further testified that in 2010 or 2011, after he notified Dyckman Deals that the steps of the stairway were worn, Dyckman Deals hired a handyman to add extra support boards to the steps to reinforce them. He explained that the reinforcement made the stairs "stronger . . . so it does not move" (Rahman tr at 17). Rahman testified that, thereafter, the stairs were "good,"

[2] In his affidavit, plaintiff reiterated that he slipped on "sand, cement and debris from dried cement from our boots" (plaintiff's aff).

and he received no complaints about them (id. at 21). When asked whether he ever noticed cement or debris on the steps, Rahman replied that he did not remember.

Rahman further testified that he was not present at the Premises when the accident occurred. After he was notified, however, he went to the Premises to check things out. Rahman stated that, while plaintiff and a coworker were still present in the basement, Kudlip had "[run] away" (*id.* at 26). When Rahman looked at the steps, he observed that "everything was all right," and that no steps were missing (*id.* at 26). In fact, Rahman even utilized the stairway at this time. Rahman maintained that, from the day of the accident to the present day, no repairs have been made to the stairway.

Affidavit of Plaintiff's Expert Engineer, Fred De Filippis

In his affidavit, Fred De Filippis stated that he conducted a site inspection of the subject stairway approximately one year after the accident. He observed that the stairway's steps were "substantially worn down" and that repairs to them had been "poorly made" (Plaintiff's notice of motion, exhibit H, De Filippis aff at 3). In addition, a section of a portable metal conveyor was fastened to the handrail of the staircase. It rendered the handrail "useless" to anyone until someone reached "halfway down the stairway" (id.). Further,"[a] close examination of the stair stringer, on the open side of the stairs revealed that a piece of the stringer against the first riser was cut or splintered off . . . [and that] a piece of the second step close to the stair stringer against the masonry foundation wall [had] been cut out" (*id.*).

De Filippis "further observed that pieces of plywood were recently installed to reinforce the support of the first & second steps to each end of the stair stringers" and that he noticed "the stair stringers slipped off their supports" (*id.*). In addition,"[t]he stair components, (steps, stringers, handrail) were noticeably deteriorated as the result of poor repairs, usage and abuse" (*id.*). De Filippis concluded that "the hazardous conditions he observed were long-standing and would have been readily observable well before the happening of the accident" (*id.* at 4).

DISCUSSION

To obtain summary judgment, a moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *accord DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If any doubt about whether triable facts exist, a court must deny a summary-judgment motion (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

In Action 1, plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant Dyckman Deals. Dyckman Deals cross-moves for dismissal of this claim. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "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."

Section 240 (1) "was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Section 240 (1) provides extraordinary protections, but

> "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; accord *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Because it is undisputed that the subject stairway, where the accident occurred, was plaintiff's "sole access to his work site," it is considered "a 'device' within the meaning of Labor Law § 240 (1)," rather than the kind of "permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute" (*Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [1st Dept 2005]; *accord Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 550 [1st Dept 2014] [finding Labor Law § 240 (1) liability where the stairway provided to the plaintiff was the "sole means of access to the floors of the building," and where the plaintiff's injuries were the direct result of the defendant's failure to provide guard rails]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008] [finding that the plaintiff's slip while traversing a

makeshift ramp which "provided the sole means of access" to the plaintiff's employer's shanty "presented a risk covered by Labor Law § 240 (1), and the record demonstrat[ed] that defendants' failure to equip it with a handrail or other safety device was the proximate cause of plaintiff's injuries"]). In addition, "'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Gory*, 113 AD3d at 551, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Dyckman and plaintiff disagree about whether the second step actually separated from the wall, but in any event, the instability of the steps, the lack of a proper handrail for plaintiff to grab onto as he fell, as well as the slippery condition of the steps, also contributed to the happening of the accident: "The precise manner in which the plaintiff's fall occurred is immaterial, there being no question that plaintiff's injuries are at least partially attributable to defendants' failure to provide guardrails, safety netting or other proper protection" (*Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 169 [1st Dept 2001]).

Notably, "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]).

Also, "'the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, and Dyckman Deals is not entitled to dismissal of the § 240 (1) claim.

Although the stairway is a permanent structure, if the stairway had not been the sole access to the basement, plaintiff still might have recovered under Labor Law § 240 (1) if it was determined that the stairway's collapse was foreseeable: "Whether the collapse or failure of a permanent structure gives rise to liability under Labor Law § 240 (1) turns on whether 'the risk of injury from an elevation-related hazard [is] foreseeable'" (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 495 [1st Dept 2010], quoting *Jones v 414 Equities LLC*, 57 AD3d 65, 75 [1st Dept 2008]). Notably, "[a] plaintiff in a case involving collapse of a permanent structure must establish that the collapse was 'foreseeable,' not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk" (*Garcia v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 494, 495 [1st Dept 2014], quoting *Jones*, 57 AD3d at 79).

It is undisputed that the permanent stairway in this case was the sole means of access to the accident site, and, thus is a "device" under the statute. It is unnecessary for the court to determine the issue of foreseeability.

The Labor Law § 241 (6) Claim

In Action 1, Dyckman Deals cross-moves for dismissal of the Labor Law § 241 (6) claim against it. 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, [and] 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*, 81 NY2d at 501-502. But Labor Law § 241 (6) is not self-executing; to show a violation of this statute and withstand a defendant's motion for summary judgment, a movant must show 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 (d), 23-1.17 (e) (1) and (2) and 23-1.7 (f), plaintiff does not address these Industrial Code violations in his opposition to Dyckman Deal's motion, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [finding that where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, defendant Dyckman Deals are entitled to summary judgment dismissing that aspect of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code, 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(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."

Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Dyckman Deals is entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d). Because the cement debris that plaintiff slipped on, which proximately caused the accident to occur, was a byproduct of the repair work underway in the basement at the time of the accident, and thus it was not a "foreign substance," as required under 23-1.7 (d) (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [finding that rebar steel that plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, it was an integral part of the work performed]; Salinas v Barney Skanska Constr. Co., 2 AD3d 619, 622 [2d Dept 2003] [holding that section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers that was an integral part of the work performed]).

Thus, Dyckman Deals is entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of § 23-1.7 (d).

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]). Industrial Code sections 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 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."

Industrial Code sections 23-1.7 (e) (1) and (2) do not apply. Plaintiff testified consistently that his injury was caused when he slipped — not tripped — on concrete debris. Plaintiff's claim regarding slipping hazards, under 23-1.7 (d), is addressed above.

In any event, 23-1.7 (e) (1) and (2) are inapplicable to the facts of this case, as the cement debris that plaintiff allegedly slipped on was an integral part of the work performed at the site of the accident (*O'Sullivan v IDI Constr. Co.*, 7 NY3d 805, 805 [2006] [finding that 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] [finding that § 23-1.7 (e) (2) did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work performed in the room]).

Thus, Dyckman Deals is entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code sections 23-1.7 (e) (1) and (2).

Industrial Code, 12 NYCRR 23-1.7 (f)

Industrial Code 12 NYCRR 23-1.7 (f) provides the following:

> "(f) 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 progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Industrial Code 12 NYCRR 23-1.7 (f) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321,1323 [3d Dept 2009]).

Here, section 23-1.7 (f), which requires that stairways provide safe access, applies to the facts of this case. As discussed above, the stairway was unstable, slippery, and lacking a proper handrail.

Thus, Dyckman Deals is not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (f).

The Common-Law Negligence and Labor Law § 200 Claims

In Action 1, defendant Dyckman Deals also moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. 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]; *accord Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). 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."

Two distinct standards applicable to § 200 cases exist, depending on the kind of situation involved, either when the accident is the result of the means and methods used by the contractor to do its work or 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]). Under Labor Law § 200, if "an existing defect or dangerous condition caused the injury, liability 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] [holding that to support a finding of a Labor Law § 200 violation, it was unnecessary to prove general contractor's supervision and control over the plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

For a court to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, an owner or agent must have exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [finding no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input in the method of moving the beam]).

Here, the subject accident resulted from an allegedly dangerous condition inherent in the Premises — the fact that the second step was unstable and lacked a proper handrail — and the means and methods of the work — the fact that construction debris was left behind by the workers and then not properly removed. Thus, the applicability of the common-law negligence and Labor Law § 200 claims against Dyckman Deals will be analyzed under both standards.

Common-Law Negligence and Labor Law § 200 Liability As Analyzed Under the Means and Methods Theory

No evidence in the record exists to demonstrate that Dyckman Deals supervised or directed the injury-producing work in this case, i.e., the transport of the cement mixture up and down the stairway, or the nightly sweeping of the steps to remove it. Dyckman Deals is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it according to a means and methods analysis.

Common-Law Negligence and Labor Law § 200 Liability as Analyzed under an Unsafe-Condition Theory

Dyckman Deals, however, is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims under an unsafe-condition analysis because a question of fact exists about whether Dyckman Deals created or had actual notice of the defects in the stairway that caused the accident. Plaintiff testified that he noticed that the stairway was old, worn, shaky, and "loose" when he traversed it (plaintiff's tr at 36). He also asserted that he complained to Kudlip about the condition of the stairway. Plaintiff's expert, De Filippis, concluded that "the hazardous conditions he observed were long-standing and would have been readily observable well before the happening of the accident" (plaintiff's notice of motion, exhibit H, De Filippis aff at 4)

However, in contrast, plaintiff and Rahman both testified that before the accident, the subject stairway had been repaired to make it more stable. Also, as evidence of his impression that the steps were fine, Rahman specifically testified that the extra support boards that were added to the stairway made the steps "stronger" and less likely to move. No evidence exists in the record to support an argument that defendant Dyckman Deals had constructive notice — that Dyckman Deals was aware of any unsafe condition, the length of time that the subject unsafe condition existed, or whether it received any prior complaints (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d 540, 541 [2d Dept 2003] [finding no constructive notice where plaintiff presented no evidence regarding the length of time the unsafe condition existed, or whether defendant had received any prior complaints about said condition]). Constructive notice means that "a defect . . . [is] visible and apparent and . . . exist[s] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]). A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the injury (*see Gordon*, 67 NY2d at 838; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [1st Dept 2008] [finding no constructive notice where, on the evidence presented, it was possible that the piece of carpet that caused the plaintiff's fall could have been deposited there just before the accident], *affd* 11 NY3d 889 [2008]).

Thus, Dyckman Deals is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it under an unsafe condition analysis.

Defendant 114 Dyckman's Motion to Dismiss under Index No. 150483/15

On February 17, 2012, plaintiff commenced Action 1 under Index No. 101777/12 against both Dyckman Deals and 114 Dyckman. In Action 1, which is still pending in this court, 114 Dyckman defaulted as to plaintiff's complaint against it. After Action 1 had been pending for one year and was on the trial calendar, Dyckman Deals impleaded 114 Dyckman as a third-party defendant. On December 19, 2013, 114 Dyckman answered and appeared as third-party defendant in Action 1. Pursuant to a stipulation of discontinuance, the third-party complaint and action were discontinued with prejudice. Plaintiff concedes that he never moved under CPLR 3215 (c), for a default judgment against 114 Dyckman in Action 1. On January 12, 2015, plaintiff commenced Action 2 against 114 Dyckman under Index No. 150483/15.

Now, 114 Dyckman moves pre-answer to dismiss the complaint under CPLR 3211 (a) (4) in that Action 2 involves the same facts and allegations as Action 1. CPLR 3211 (a) (4) provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . . another action pending between the same parties for the same cause of action in a court of any state or the United States . . . . "

Here, as 114 Dyckman argues, both Action 1 and Action 2 allege that plaintiff sustained personal injuries on January 17, 2012, as a result of the subject construction accident which occurred at the Premises. In both complaints, plaintiff specifically alleges causes of action sounding in common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6).

To date, plaintiff has not moved for a default judgment against 114 Dyckman in Action 1. Plaintiff never discontinued its case against 114 Dyckman in Action 1. Action 1 is still pending and ongoing as to 114 Dyckman. Thus, defendant 114 Dyckman is entitled to an order dismissing plaintiff's complaint against it in Action 2 under Index No. 150483/15.

Accordingly, it is hereby

ORDERED that plaintiff Piara Singh's motion in Action 1 (index No. 101777/2012), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant Dyckman Deals, Inc. (Dyckman Deals), is granted; and it is further

ORDERED that Dyckman Deals's cross-motion in Action 1 (index No. 101777/2012), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims, with the exception of that part of the Labor Law § 241 (6) claim predicated on alleged violation of Industrial Code 12 NYCRR 23-1.7 (f), is granted, and these claims are dismissed as against Dyckman Deals, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the Action 1 under index No. 101777/2012 shall continue; and it is further

ORDERED that defendant 114-118 Dyckman Realty LLC's (114 Dyckman) motion in Action 2 (index No. 150483/2015) under CPLR 3211 (a) (4), to dismiss plaintiff's complaint is granted, and the complaint is dismissed as against 114 Dyckman with costs and disbursements to this defendant as taxed by the Clerk of Court; and it is further

ORDERED that defendants serve a copy of this decision and order on all parties with notice of entry and serve the County Clerk's Office, which is directed to enter judgment accordingly for both actions.

Dated: October 4, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.