At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of May, 2018.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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THOMAS F. MORLEY,

Plaintiff,

- against -

F.J. SCIAME CONSTRUCTION CO., INC. and THE CITY OF NEW YORK,

Defendants.

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Index No.: 509962/2015

DECISION AND ORDER

Motion Sequence, #2

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3
Memorandum of Law	4
Reply Affidavits (Affirmations)	5

Upon the foregoing papers, and after argument, the Court finds as follows:

Plaintiff, Thomas Morley (hereinafter the "Plaintiff") commenced the subject action by filing a summons and verified complaint on August 12, 2015. Plaintiff alleges that on December 11, 2014 while working as a carpenter in the employ of non-party New York Concrete (hereinafter "NYCC") at the premises known as 285 Jay Street, Brooklyn, N.Y. (hereinafter "the Premises") he injured himself when he "...slipped on oil, water proofing, and debris in an improperly lit work area...". Plaintiff commenced this action against F.J. Sciame Construction Co. Inc. (hereinafter "Sciame") and The City of New York (hereinafter "the City")(collectively hereinafter the "Defendants").

Defendants now move (motion sequence #2) for the following relief: 1) dismissal of the Complaint as against the City, 2) the granting of summary judgment and dismissal of common law negligence claims against Sciame and 3) the granting of summary judgment and dismissal of New York State Labor Law §§200, 240 and 241 claims as against Sciame. As to the Complaint in relation to the City the Defendants contend that the City transferred its ownership interest in the Premises to non-party Dormitory Authority of the State of New York (hereinafter "DASNY") in February 2013 and that non-party City University Construction Fund (hereinafter "CUCF") retained Sciame as construction manager at the Premises for the erection of an academic building (the "Project"). As such the Defendants argue that the City has no liability in this proceeding. Defendants further contend that Sciame, having the role of construction manager did not create or control or have notice of the condition that allegedly caused the Plaintiff to injure himself. Therefore, the Defendants contend, any claim premised upon common law negligence or a violation of Labor Law §200 must be dismissed. Finally, the Defendants aver that the slip and fall as alleged did not concern an elevation related hazard or condition or constitute a violation of a provision of the Industrial Code. As such the Defendants contend that Plaintiff's Labor Law §240(1) and §241(6) claims are unfounded.[1]

Plaintiff opposes the Defendant's motion in relation to Sciame on the Plaintiff's Labor Law §240 claim. As to the Plaintiff's Labor Law §241(6) claims, the Plaintiff contends that both 12 NYCRR 23-1.7(d) and 23-1.30 were violated. Further, the Plaintiff contends that the Defendants are liable with respect to a violation of Labor Law §200 and common law negligence, as they either created knew or should have known of the unsafe conditions at the premises which were the proximate cause of the Plaintiff's injury. In so far as the Plaintiff does not oppose the

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[1] The Plaintiff also instituted a claim for his alleged injuries against the State of New York in the New York Court of Claims (Claim No. 125605). Pursuant to Stipulation of Conditional Dismissal and Order dated November 30, 2015 in that proceeding, unless the Plaintiff as Claimant reactivated its claim on or before 5:00 p.m. on the ninetieth day after final disposition of that action the claim was to be dismissed with prejudice on the merits. The Stipulation was "So Ordered" by the Honorable Fiola A. Soto, Judge of the Court of Claims.

Defendant's motion for dismissal of its Labor Law 240(1) claim that claim is accordingly dismissed.

As an initial matter, the Plaintiff concedes at Paragraph 4 of its affirmation in opposition that "[t]he property was owned by the Dormitory Authority of the State of New York." The Plaintiff points to the Defendant's motion at Exhibit "O" which is an indenture that reflects that on the 26th day of February 2013 the City transferred title to the Premises to DASNY. That document was apparently recorded on March 14, 2013 in the Office of the City Register of the City of New York. Plaintiff is otherwise silent on the issue and does not further address ownership or the basis upon which it contends the City maintains liability for the injuries allegedly sustained by the Plaintiff. Accordingly, the action as against the City is dismissed. *See Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 95, 30 N.E.3d 154, 157 [2015] (holding that where summary judgment is not otherwise opposed, dismissal is appropriate).

As to the claims against Sciame, Sciame in support of its motion proffers both the deposition (Plaintiff's motion Exhibit K) and Affidavit (Defendant's motion Exhibit P) of Anthony Primiani, who states that he has been employed by Sciame since 2004. According to the affidavit, Primiani was employed as a project superintendent at the time of the accident, and as of the date of the affidavit was a senior project superintendent since March of 2016. Primiani states that he was the project superintendent for the project at the Premises beginning in January of 2014. He states generally that Sciame "...did not control the means or methods of the work performed by employees of New York Concrete, WDF..." the Plumbing subcontractor, "... or any other subcontractor" (Defendant's Exhibit P, paragraph 5). Primiani also states that he understands that the Plaintiff alleges that he slipped on glue used to connect PVC pipe on level C-2 of the Project but that WDF did not install PVC pipe or use PVC glue at the C-2 level. (Defendant's Exhibit P, paragraphs 7-9) Primiani contends that only NYCC, non-party employer

of the Plaintiff, used PVC on the C-2 level of the basement. Primiani states that "New York Concrete used PVC piping for the dewatering system had been installed and removed week prior to the Plaintiff's alleged accident on December 11, 2014." (Defendant's Exhibit P, Paragraph 10).

Primiani also states that he walked through the accident area on December 11, 2014 and did not see "..any spilled PVC glue or other spilled liquid on the ground..." He also states that there were no complaints of spilled glue prior to the accident. As to the lighting Primiani states that "...the C-2 level of the Project was lit with standard construction light stringers, which are light bulbs placed in cages and hung from the ceiling to provide light." He states that there were no complaints regarding the lighting and that Sciame's electrical subcontractor provided the lighting and Sciame did not control the means or methods of the work performed by that contractor, Five Star Electric. (Defendant's Exhibit P, Paragraph 11-14). Primiani's deposition also reflects the statements provided in his affidavit (See Defendant's Exhibit K).

Sciame also asserts that they contracted the services of City Safety to perform site safety management at the Project. Sciame also provides the affidavit of Martin R. Bruno. Mr. Bruno states that he is a certified Construction Health and Safety Technician since 2007. (See Defendant's Motion Exhibit Q). Generally, Mr. Bruno points to what he determines to be contradictions in both the Plaintiff's and Primiani's testimony and Mr. Bruno also seems to make legal determinations about the applicability of the Labor Law. As a practical matter the only arguably meaningful findings of Mr. Bruno relate to the adequacy of the lighting and the slipperiness of PVC glue. As to the lighting Mr. Bruno does not indicate that he inspected the site and he bases his determination of the adequacy of the lighting on deposition testimony. As to the slipperiness of the glue, assuming the substance at issue was PVC glue, he does find that the substance does dry very quicly in that he found that the substance is no longer slippery or sticky ("tacky") after drying for a minute. (See Defendant's Motion Exhibit Q Paragraphs 17-24).

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 200, Common-Law Negligence

Labor Law § 200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi v Stout*, 80 NY2d 290; 294-295 [1992]; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Turning to the merits of the Defendant Sciame's motion that the Plaintiff's claim made pursuant to Labor Law §200 and common law negligence be dismissed, the Court finds that sufficient evidence has been presented by the Defendant to meet its *prima facie* burden. The Defendant argues that it did not directly supervise the Plaintiff and that it is unclear that the condition at issue, namely the slippery substance, ever existed. The Defendant also contends that, even assuming, *arguendo,* that a slippery subtance did exist, Defendant did not create the alleged condition at issue or have actual or constructive notice of its existence. In support of its application, the Defendant relies on the deposition testimony of the Plaintiff, an affidavit and the

deposition testimony of Defendant's project superintendent Anthony Primiani and an affidavit of Martin Bruno, a construction safety engineer. In his deposition testimony the Plaintiff, when asked whether he was able to see the substance that caused him to slip, replied (Defendant's Motion, Exhibit "E" Page 29) that "[i]t looked clear, like transparent type of oil or glue." When asked (Defendant's Motion, Exhibit "E" Page 35) if he had seen this substance earlier in the day on the floor or on the floor in another location the Plaintiff answered "[n]o". Anthony Primiani, an employee for Defendant Sciame, testified (Defendant's Motion, Exhibit "K" Page 6) that at the time of the alleged incident he was the project supervisor at the location at issue. Primiani testified (Defendant's Motion, Exhibit "K" Page 65) during his deposition that "I typically walk the job site multiple times a day." When asked during his deposition (Defendant's Motion, Exhibit "K" Page 70) what the Plaintiff indicated to him regarding what had happened, Primiani testified that the Plaintiff "told me that while he was putting protection over ejector pits he felt a pinch in his back and that was it." In his affidavit (Defendant's Motion, Exhibit "P" Paragraph 11), Primiani states that he conducted a walkthrough the date of the accident and "[d]uring my walkthrough, I did not observe any spilled PVC glue or other spilled liquid substance on the ground near the sump pump area. At no time on or prior to December 11, 2014, did anyone complain about any spilled PVC glue on the C-2 level of the Project." What is more, the affidavit from Martin R. Bruno, a certified Construction Health and Safety Technician, states (Defendant's Motion, Exhibit "Q" Paragraph 20) that even if PVC glue of the type used on the work site had been spilled onto the floor, it would have dried quickly and would not have been on the ground for very long before it hardened. This evidence, taken together, shows that, even assuming that the Plaintiff's accident arose out of a dangerous condition at the work site, namely the existence of a slippery substance, the Defendant did not cause or have actual or constructive notice of the alleged condition at issue. See *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 130, 867 N.Y.S.2d 123, 130 [2nd Dept, 2008].

The Plaintiff concedes that the Defendant did not have supervisory control over the Plaintiff (Affirmation in Opposition Paragraph 53), but the Plaintiff does not concede the issue of notice. However, the Plaintiff has failed to raise an issue of fact as to whether the substance, which was described as glue or oil, was known by the Defendant to be on the ground, or was on the ground for a sufficient period of time so as to create constructive notice on the part of the Defendant. While Bruno testified that any glue spilled on the floor while assembling the PVC piping would have dried prior to the alleged incident, the Plaintiff attempts to raise an issue of fact by pointing to the testimony of Primiani (Defendant's Motion, Exhibit "K" Pages 62, 63, 68). Primiani testified that cast iron piping was assembled in the same area prior to the alleged incident at issue. When asked who installed the cast iron drain pipe, Primiani stated (Defendant's Motion, Exhibit "K" Pages 62) "[t]hat would be our plumber WDF." Primiani also acknowledged (Defendant's Motion, Exhibit "K" Pages 68) that WDF did this work at the Premises prior to the date of the Plaintiff's accident. However, the Plaintiff is unable to show that the work by WDF in relation to the cast iron pipes involved any slippery substance such as glue or oil. As a result, this testimony fails to raise an issue of fact as to whether the slippery substance was created prior to the alleged incident by the assembling of cast iron piping and should have been discovered and remedied prior to the Plaintiff's accident. See *Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043, 1047, 947 N.Y.S.2d 566, 571 [2nd Dept, 2012]; *McLean v. 405 Webster Ave. Assocs.*, 98 A.D.3d 1090, 1093, 951 N.Y.S.2d 185, 189 [2nd Dept, 2012]; *Schultz v. Hi-Tech Const. & Mgmt. Servs., Inc.*, 69 A.D.3d 701, 702, 893 N.Y.S.2d 225, 226 [2nd Dept, 2010]. As a result, the Plaintiff's Labor Law §200 and common law negligence claims are dismissed.

Labor Law § 241(6)

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; *Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010].

As an initial matter the Plaintiff does not contest the Defendant's position that 12 NYCRR 23-2.1(a)1 is inapplicable to this case. Plaintiff's primary allegation is that a slippery substance, maybe glue or oil, and insufficient lighting caused his accident. 12 NYCRR 23-2.1(a)1 relates to the storage of building materials. There is no allegation by the Plaintiff that his fall was caused by misplaced building material or equipment. Accordingly, the Plaintiff's Labor Law §241(6) claim in relation to 12 NYCRR 23-2.1(a)1 is dismissed.

Turning to the merits of the Defendant Sciame's motion that the Plaintiff's claim made pursuant to Labor Law §241(6) be dismissed, the Court finds that insufficient evidence has been presented that the Defendant was not in violation of Industrial Code 12 NYCRR 23–1.7(d). Defendant has failed to meet its *prima facie* burden. The Defendant argues that the facts of the case do not support a violation of Industrial Code 12 NYCRR 23–1.7(d). "That regulation, in pertinent part, unequivocally directs employers not to '*suffer or permit any employee*' to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe

footing by requiring that any 'foreign substance which may cause slippery footing *shall be removed ... to provide safe footing.*'" *Rizzuto v. L.A. Wenger Contracting Co.,* 91 N.Y.2d 343, 350–51, 693 N.E.2d 1068, 1072 [1998], quoting 12 NYCRR 23–1.7(d). In his deposition testimony, the Plaintiff testified (Defendant's Motion, Exhibit "E" Page 25) that "I got about 2 feet away from the penetration where I was going to put the plywood and I slipped onto a substance, I jerked my back, let go of the plywood." When asked whether he was able to see the substance that caused him to slip the Plaintiff replied (Defendant's Motion, Exhibit "E" Page 29) that "[i]t looked clear, like transparent type of oil or glue." The Defendant is not arguing that it is not the general contractor and therefore not subject to the non-delegable duty set forth by Labor Law 241(6), but merely that it did not violate 12 NYCRR 23–1.7(d). *See Wrighten v. ZHN Contracting Corp.*, 32 A.D.3d 1019, 1021, 822 N.Y.S.2d 115, 117 [2nd Dept, 2006]. This is insufficient for the Defendant to meet its *prima facie* burden for summary judgment on this claim. "Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant to the imposition of Labor Law § 241(6) liability." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1072–73 [1998]. Accordingly, the Defendant's application in relation to the Plaintiff's Labor Law 241(6) claim for violation of Industrial Code 12 NYCRR 23–1.7(d) is denied.

Turning to the merits of the Defendant Sciame's motion that the Plaintiff's claim made pursuant to Labor Law 241(6) be dismissed, the Court finds that insufficient evidence has been presented that the Defendant was not in violation of Industrial Code 12 NYCRR 23–1.30. The Defendant has failed to meet its *prima facie* burden. 12 NYCRR 23–1.30 provides that

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

When asked in his deposition whether the conditions in the work site were lighter or darker than a picture of the location (Defendant's Motion, Exhibit "I" Page 45) , the Plaintiff testified "I will have to say darker." When asked (Defendant's Motion, Exhibit "I" Page 46) if the condition of the lighting at the time caused the accident, the Plaintiff responded "I mean, I don't know. If it was lighting like this, daylight outside, I probably would have saw [sic] something." In the instant matter, the Defendant does not contend that 12 NYCRR 23–1.30 was not applicable to the facts of this case and has not provided sufficient evidence that the lighting at the job sight complied with the requirements of 12 NYCRR 23–1.30. *See Fritz v. Sports Auth.*, 91 A.D.3d 712, 713, 936 N.Y.S.2d 310, 311 [2nd Dept, 2012]. Instead, the Defendant primarily argues that the Plaintiff cannot maintain his Labor Law 241(6) cause of action against it in relation to Industrial Code 12 NYCRR 23–1.30 because, even assuming such a violation existed, this was not the proximate cause of the alleged incident. *See Ramos v. Patchogue-Medford Sch. Dist.*, 73 A.D.3d 1010, 1012, 906 N.Y.S.2d 45, 47 [2nd Dept, 2010]. Moreover, the Defendant merely relies on the affidavit Martin Bruno who states (Defendant's Motion, Exhibit "Q" Paragraph 23) that based upon his review of Primiani's deposition testimony, the lighting "described in the C-2 level of the Project was adequate, sufficient for safe working condition, and in accordance with accepted construction practices." However, the Plaintiff's testimony cited above creates a material issue of fact as to whether the lighting at the work site constituted a violation of 12 NYCRR 23–1.30 and was a proximate cause of the alleged accident. This is an

issue that should be left to a jury to decide. Accordingly, the Defendant's application in relation the Plaintiff's Labor Law 241(6) cause of action in relation to Industrial Code 12 NYCRR 23–1.30 is denied.

Based upon the foregoing, it is hereby Ordered that:

Defendants' motion (motion sequence #2) is denied, with the exception that the complaint against the City is dismissed, the Plainitiff's cause of action based on Labor Law 240(1) is dismissed, the Plaintiff's cause of action based on Labor Law 200 and common law negligence is dismissed and that aspect of the Plaintiff's cause of action based on a 12 NYCRR 23-2.1(a)1 Labor Law 241(6) violation is also dismissed.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.