Ryan v BMR-Landmark at Eastview LLC
2020 NY Slip Op 30338(U)
February 6, 2020
Supreme Court, New York County
Docket Number: 150878/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JOSEPH RYAN,

Plaintiff,

- v –

BMR-LANDMARK AT EASTVIEW LLC, BIOMED REALTY TRUST, INC., BIOMED REALTY, L.P., THE PIKE COMPANY, INC., MORIARITY CONTRACTING SERVICES, INC., PIKE/MORIARTY, A JOINT VENTURE, JOHN MORIARTY & ASSOCIATES, INC.,

Defendants.

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INDEX NO. 150878/2015

MOTION DATE

MOTION SEQ. NO. 008, 009, 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 303-327, 396, 402, 405, 408-434, 502-503, 506, 509-513, 528-529, 541

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 328-358, 394, 403, 406, 435- 461, 492, 504, 507, 514-515, 518-520, 526-527, 530, 537, 542

were read on this motion for dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 359-393, 395, 397, 404, 407, 462-501, 505, 508, 516-517, 521-525, 531-536, 539-540, 543

were read on this motion for summary judgment.

By notice of motion, third-party defendant/second third-party defendant United Iron, Inc. moves pursuant to CPLR 3212 for an order dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims and the claims against it for common law indemnity and/or contribution (mot. seq. eight). Plaintiff opposes and, by notice of cross motion, moves pursuant to CPLR 3212 for an order granting him summary judgment on liability on his Labor Law §§ 241(6) and 200 claims

and directing an inquest on damages. United Iron, third-party defendant Garito Contracting, Inc., defendants/third-party plaintiffs BMR-Landmark at Eastview LLC, Biomed Realty Trust, Inc., Biomed Realty, L.P., and John Moriarty & Associates, Inc. (JMA) (collectively, BMR), and defendant/third-party plaintiff The Pike Company (Pike) oppose the cross motion.

By notice of motion, defendant/second third-party plaintiff Pike moves pursuant to CPLR 3212 for an order dismissing plaintiff's Labor Law §§ 240(1) and 200 and common law negligence claims against it and granting it judgment on its claim for contractual indemnity against United Iron (mot. seq. nine). Plaintiff opposes, and United Iron opposes the portion of the motion seeking indemnity from it.

By notice of motion, BMR moves pursuant to CPLR 3212 for an order dismissing plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims and, in the event that there is a finding of liability against BMR, an order granting it partial summary judgment against United Iron and Garito on its contractual and common law indemnification claims. Plaintiff and Pike oppose, and United Iron and Garito partially oppose.

At oral argument on the motions, plaintiff withdrew his Labor Law § 240(1) claim.

The motions are consolidated for decision.

I. PERTINENT BACKGROUND

A. Plaintiff's testimony (NYSCEF 316)

In November 2014, plaintiff was working for United Iron on a construction project at a site on Old Saw Mill River Road. His job was to reinforce concrete openings with steel beams, taking direction only from his foremen.

At 6:30 a.m., on January 5, 2015, plaintiff arrived at the work site. United Iron employees ordinarily signed in at United Iron's onsite trailer before starting work. Plaintiff could not

remember the weather that morning.

Plaintiff parked his vehicle and waited for one of his foreman to arrive in order to open the trailer, which the foreman did sometime between 6:45 and 7:00 a.m. Plaintiff followed the foreman from the parking area to the curb of the road and then down a dirt slope to the trailer, a route he took every morning. He was never told of an alternative route to enter the trailer. Plaintiff described the route as a "trail," going from the curb and straight down toward the trailer, and it was "smoothed down" from people walking on it. He had previously slipped on the slope a few times. Although he had complained that the slope was too slippery to his coworkers and his foreman, he had never complained to BMR or Pike about any conditions related to the jobsite, including the slope or lighting.

While walking toward the trailer that day, plaintiff had no problem with the surface being slippery, and he could not remember if it was hard and/or solid. He did not notice the condition of the trail as it was dark out, and while he "could make out shapes . . . see the trailer . . . [and] knew where the dirt was," he did not know what the dirt looked like that day. There was no artificial light shining on the trail, and although there was a nearby light pole, plaintiff did not know if it was on or functional. After taking two steps from the curb, and approximately six feet from the entrance to the trailer, plaintiff's left foot slipped out from under him due to mud on the dirt path, causing him to fall and injure himself.

B. BMR's deposition testimony (NYSCEF 317)

The senior director of development for BioMed Realty LP, the managing agent for BMR, the owner of the property on which the project was ongoing, testified that in 2013, BMR and Regeneron Phamaceuticals, Inc. entered into a lease agreement for the buildings under construction at the project site. As part of the agreement, BMR was to build two buildings there

and in August 2013, it retained JMA as the construction manager. The director had no personal knowledge as to whether a trailer was used at the site, or who, if anyone, decided where trailers would be located at the site or the conditions of the site. He believed that it was the responsibility of JMA's superintendent to inspect the site daily for safety and progress.

C. JMA's deposition testimony (NYSCEF 319)

1. Project manager

JMA's project manager on the construction site testified that JMA subcontracted with United Iron to provide miscellaneous metal work, and with Garito, to strip and prepare the site and the excavation for foundations. JMA's role was to build the external buildings on the site, while Pike was hired by Regeneron as its construction manager for constructing the building interiors. The project manager was on site one or two days a week.

JMA coordinated the work of the subcontractors by directing them to work at particular areas at specific times and ensuring that their work was done in a workman-like manner. It was also responsible for site safety, had the authority to stop work if an unsafe condition was observed, and employed a site safety manager to patrol the site for safety.

United Iron's lead foreman was at the site daily. If there was an issue with United Iron's work or employees, JMA contacted the lead foreman who also served as Pike's onsite foreman.

The project manager identified JMA's site superintendent as the person who determined the locations of the workers' onsite trailers. Before construction began, JMA selected an area in front of an existing building to the left of the main access road from Old Saw Mill River Road. The project manager described the access road as having been paved with "binder," which is larger and coarser than asphalt. He was uncertain if, at the time of plaintiff's accident, the area or path in front of United Iron's trailer had been paved with binder.

In 2014, JMA relocated its trailer to the right side of the access road. While the area allotted for the subcontractors' trailers remained in the original location, some were moved to a parking lot used by Pike during the first week of January 2015; United Iron's trailer was moved sometime between mid to late January and March 2015.

The project manager identified a photograph as depicting the portion of the site as of January 19, 2015, with the subcontractors' trailers in the original location, including United Iron's tan trailer. When the trailer was first placed in the area where plaintiff had his accident, the ground in front of it was flat and level; there was no slope as the road next to it had not yet been built. Garito, under JMA's supervision, later built the access roadway parallel to the entrance of the United Iron trailer. The height of the roadway was approximately six feet tall.

The project manager stated that while the roadway was being built, JMA's site superintendent established a path of egress into the original trailer area from an area behind the trailer. That path remained until the trailers were relocated to the Pike lot. To access their trailer, United Iron workers were expected to use that path, and not the path on which plaintiff had slipped. At times, the alternative path was covered in water and mud, which the project manager conceded was unsafe. According to Garito's proposal for its work at the site, which was accepted by JMA, Garito was not responsible for removing standing water at the site.

The project manager did not how long the path on which plaintiff fell had been in an unsafe condition after December 22, 2014, when JMA had substantially completed its work on the site. JMA remained on site after December 22 to finish its work through the spring of 2015, and on January 7, 2015, JMA turned over control of the jobsite to Pike.

According to the project manager, plaintiff's accident occurred in JMA's trailer area. If Pike had been aware of the unsafe condition, it would have been good, safe, and accepted

construction practices for Pike to alert JMA. He denies that JMA was ever notified about an unsafe condition in front of United Iron's trailer, and he had received no complaints about its location or the condition of the area. Ultimately, it was JMA's responsibility to maintain the area safely, although no JMA employee was tasked with patrolling the trailer area for safety.

D. United Iron's deposition testimony (NYSCEF 425)

A United Iron foremen testified that United Iron began working for JMA at the site in June 2014 and then for Pike in early to mid-December 2014. When he arrived on site in June 2014, there was no trailer for United Iron workers, but United Iron thereafter rented a trailer which was delivered within the month. JMA directed United Iron to place its trailer in the parking lot area with the other trailers, but only in the general area and not the specific spot in which it was placed. Thus, United Iron decided on the specific location of the trailer.

At the time of plaintiff's accident, United Iron was working for both JMA and Pike. Between June 2014 and plaintiff's accident, the location of United Iron's trailer had been twice moved by Garito, at JMA's direction, within the original trailer area and closer to the site entrance. The trailer was placed in front of a dirt roadway; a slope led downward to the trailer's entrance. Garito had constructed the roadway, and the trailer was in that spot for two to three months before plaintiff's accident.

United Iron workers daily parked their cars in the adjacent parking lot and walked down the slope of the roadway to enter the front door of the trailer. In the mornings, it was dark in front of the trailer. A picture taken of the site the day of plaintiff's accident reflects that there was mud on the slope. The foreman did not know how long the mud was there before the accident. When it rained, the area in front of the trailer flooded, but the foreman lodged no complaint nor had anyone complained to him about the mud or the location of the trailer, and no prior accidents

were reported as having occurred there. While the foreman described the slope as moderately steep, he did not know its incline beyond estimating it at "probably" 30 degrees, and he did not recall having had a problem with insufficient lighting when walking to the trailer.

Although there was another entrance into the trailer area apart from the slope, United Iron workers were not instructed to use the alternative entrance. The foreman acknowledged that he may have used it.

E. Pike's evidence (NYSCEF 318, 351)

1. Deposition testimony

Pike's project superintendent testified that Pike had been hired to build the interior of the buildings on the site and employed a site safety manager from November 2014 to January 2015. The site safety manager was the lead superintendent who managed the daily activities at the site, including safety issues.

When Pike began work at the jobsite in October 2014, the subcontractors' trailers were located in the original trailer area. In November 2014, Pike retained United Iron and at the time of plaintiff's accident, United Iron had begun performing that work as well as continuing its work for JMA.

If an unsafe condition caused an accident in an area that was not controlled by Pike, Pike had no responsibility to remedy the condition. The project superintendent never entered the JMA trailer area before or after plaintiff's accident and he had no knowledge of an unsafe condition related to United Iron's trailer. According to him, Pike had no role in placing United Iron's trailer in the JMA trailer area or its location, nor did it have a role in monitoring or remedying conditions in that area. While he drove by JMA's trailer area when he arrived at and left the site, he did not observe conditions in the area.

The project superintendent learned of plaintiff's accident more than a year thereafter from a Pike office employee; no one from JMA or United Iron informed him of it.

2. Affidavit

By affidavit dated January 10, 2019, Pike's project superintendent states that he received no complaints about conditions near United Iron's trailer. (NYSCEF 351).

3. Deposition testimony (NYSCEF 322)

Pike's site safety inspector at the time of plaintiff's accident created an incident report in which he recorded plaintiff's statements, writing that the accident had occurred in JMA's trailer area over which Pike had no control or responsibility and that plaintiff had slipped on mud after he stepped over the curb onto the dirt path. On the day of the accident, he photographed the conditions around United Iron's trailer. He knew of no complaints about conditions in JMA's trailer area.

II. UNITED IRON'S MOTION TO DISMISS PLAINTIFF'S LABOR LAW § 241(6) CLAIM (NYSCEF 303); PLAINTIFF'S CROSS MOTION FOR JUDGMENT ON HIS LABOR LAW § 241(6) CLAIM (NYSCEF 462)

A. Contentions

1. United Iron (NYSCEF 303)

United Iron addresses all of the Industrial Code (Code) violations cited in plaintiff's bill of particulars. In opposition to the motion, plaintiff solely relies on Code violations 12 NYCRR §§ 23-1.7(d) and (f), 12 NYCRR 23-1.23(a), (b), and (d), and 23-1.30. (NYSCEF 487). As plaintiff is deemed to have waived reliance on any other Code provisions, only the remaining ones are addressed.

United Iron denies that 12 NYCRR § 23-1.7(d) applies here as the muddy open area where plaintiff fell is not a passageway, walkway, or working area contemplated by the

provision. Nor does subsection (f) apply as work was not performed in that area on levels above and below the ground. It claims that section 23-1.23 is inapplicable as the surface on which plaintiff slipped was an embankment, not a ramp or runway, and that Code section 23-1.30 is inapplicable as plaintiff's claim that the area was insufficiently illuminated is too vague to support a violation.

2. Plaintiff (NYSCEF 487)

Plaintiff alleges that he was injured while walking down a path or walkway that provided ingress or egress to his work trailer. He claims that, in effect, it was an earthen ramp, and that therefore, 12 NYCRR § 23-1.7(d) applies and was violated when defendants failed to ensure that ice, snow, water, or other foreign substance on the ramp did not create a slippery condition. Subsection (f) was also violated as the top of the path was six feet above the entrance to the trailer. Having slipped on an earthen ramp, plaintiff argues that defendants also violated Code section 23-1.23, which requires that earthen ramps be constructed in a particular manner with safety railings if the ramp is more than four feet above the ground. Plaintiff also contends that there was inadequate lighting as there was no artificial lighting illuminating the ramp, which he denies is insufficiently vague.

3. Garito (NYSCEF 516)

Garito repeats United Iron's arguments about the inapplicability or insufficiency of the alleged Code violations cited by plaintiff, and maintains that triable issues of fact as to plaintiff's comparative negligence preclude a finding that he is entitled to summary judgment on his Labor Law § 241(6) claim.

4. BMR (NYSCEF 528)

BMR also argues that none of the Code regulations cited by plaintiff is applicable and/or

was violated. In particular, it contends that the Code provision related to proper illumination of a worksite is inapplicable as the incident did not occur within the worksite, but outside while plaintiff was walking to his work trailer, and he did not identify the lack of illumination as a cause of his fall but only observed that it had been dark out.

B. Analysis

1. 12 NYCRR § 23-1.7 Protection from general hazards

(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 substances which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

The applicability of subsection (d) depends on whether the plaintiff slipped on a foreign substance such as ice, snow, water, or grease. Here, plaintiff slipped in an open area exposed to outside elements, on mud allegedly resulting from rain or snow. Thus, in *Gielow v Coplon Home*, subsection (d) was found inapplicable where the plaintiff had slipped and fallen on a muddy and slippery sloped embankment, and had not slipped on a foreign substance. (251 AD2d 970 [4th Dept 1998], *app dismissed and lv denied* 92 NY2d 1042 [1999]; *see also O'Gara v Humphreys & Harding, Inc.*, 282 AD2d 209 [1st Dept 2001] [same]; *Scarupa v Lockport Energy Assocs.*, 245 AD2d 1038 [4th Dept 1997] [same]). And in *Fitzgerald v Marriott Intl., Inc.,* the Court held that by slipping on mud-covered insulation while walking down a ramp, plaintiff had not slipped on a "slippery condition" or foreign substance within the meaning of 12 NYCRR § 23-1.7(d). (156 AD3d 458 [1st Dept 2017]). In *Conklin v Triborough Bridge & Tunnel Auth.*, by contrast, the plaintiff had slipped and fallen on mud covering a makeshift ladder that had been placed across a sloped ground to function as a ramp. The Court found that the plaintiff's claim that this Code subsection was violated should have been sustained, observing that the plaintiff "slipped not on the muddy ground but on mud covering the cross-pieces of the ramp." (49 AD3d

320 [1st Dept 2008]).

Moreover, an open, unpaved area like the one where plaintiff had fallen does not constitute a passageway, walkway, or other working surface within 12 NYCRR § 23-1.7(d). (*Carrera v Westchester Triangle Hous. Dev. Fund Corp*., 116 AD3d 585 [1st Dept 2014] [open, unpaved area where plaintiff walked and tripped on rock not passageway]; *Bannister v LPCiminelli, Inc*., 93 AD3d 1294 [4th Dept 2012] [same]; *Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012] [plaintiff's accident on ground covered with snow and/or ice while he walked from his car to work trailer not governed by 12 NYCRR § 23-1.7(d)]; *Roberts v Worth Constr., Inc*., 21 AD3d 1074 [2d Dept 2005] [plaintiff fell on snow and ice on temporary roadway located in open area at ground level, which was not passageway, walkway, or other elevated surface within Code provision]; *Barnes v DeFoe/Halmar*, 271 AD2d 387 [2d Dept 2000] [muddy open area of construction site where plaintiff slipped not passageway, walkway, or working area contemplated by subsection]; *Muscarella v Herbert Constr. Co*., 265 AD2d 264 [1st Dept 1999] [plaintiff's accident where, while walking from jobsite to construction trailer, he tripped over metal grate located two feet from trailer's steps, not covered by § 23-1.7 as accident occurred in "open area" which did not constitute working surface]; *Jennings v Lefcon Partnership*, 250 AD2d 388 [1st Dept 1998], *lv denied* 92 NY2d 819 [1999] [plaintiff injured in open area between two buildings under construction and thus not in passageway, walkway and/or working area contemplated by 12 NYCRR § 23-1.7]).

On point is *Constantino v Kreisler Borg Florman Gen. Constr. Co*., where the plaintiff fell in an "open area of the site along a path formed by the flow of men walking back and forth between the area where their cars were parked and the building under construction." The Court held that 12 NYCRR § 23-1.7(d) was inapplicable as plaintiff did not fall in an area within the

meaning of that subsection. (272 AD2d 361, 362 [2d Dept 2000]).

Quigley v Port Auth. of N.Y. & N.J. is inapposite as there, the plaintiff had slipped on snow-covered pipes located directly outside the entrance door of his employer's work trailer. The Court found that there was an issue of fact as to whether the accident had occurred on a walkway, given conflicting evidence of whether the pipes impeded ingress and egress into the trailer. (168 AD3d 65 [1st Dept 2018]). Here, the mud on which plaintiff slipped was not impeding ingress or egress into the trailer, nor was it directly outside of the trailer's entrance door.

Subsection (d) is thus inapplicable to plaintiff's accident.

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

Subsection (f) applies to work being performed above or below ground level. Here, the path did not provide access to a working area above or below ground level. Rather, it led from the curb of the roadway downhill to United Iron's trailer, and neither the curb nor the parking lot was a "working level" absent evidence that work was being done there. (*See Trombley v DLC Elec., LLC*, 134 AD3d 1343 [3d Dept 2015] [subsection (f) inapplicable as accident did not involve plaintiff's ascent or descent to different level]; *Torkel v NYU Hosp. Ctr.*, 63 AD3d 587 [1st Dept 2009] [where ramp operated as bridge between height differential of edge of worksite at curb level and adjacent road surface, it did not provide access to above- or below-ground working area within meaning of subsection (f)]).

In *Conklin v Triborough Bridge & Tunnel Auth.*, the trial court found that there was an issue of fact as to whether subsection (f) applied based on testimony that the plaintiff had walked down a muddy slope over a ladder that had been placed on the ground to function as a ramp in

order to access another working level. (2006 WL 6067463 [Sup Ct, Bronx County 2006]). In affirming, the appellate division found that the ramp provided a means of access to different working levels. (49 AD3d 320 [1st Dept 2008]). By contrast, in *Lynch v 99 Washington, LLC*, the plaintiff had fallen when he stepped from his employer's trailer and onto a free-standing stairwell that was allegedly misaligned with the trailer's doorway; the trailer was placed in the parking lot and used for storing tools and as a break area. The Court held that while the trailer was located on a construction site, as construction work was not performed in the trailer and at the time of the accident, the plaintiff was not performing work, the trailer did not constitute a "working level." (80 AD3d 977 [3d Dept 2011]).

Here, as in *Lynch*, there is no evidence that the path was the means of access between different working levels, or that work was performed in the trailer.

2. 12 NYCRR § 23-1.23. Earth ramps and runways.

(a) Construction. Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive unevenness.

The regulation of the construction, maintenance, and safety of "earth ramps and runways" made of "soil, gravel, stone or similar embankment material" is governed by 12 NYCRR § 23-1.23. Plaintiff submits no expert opinion to support his claim that the slope at issue here constitutes an earth ramp, which is undefined in the Industrial Code. (*See e.g., Ross v DD 11th Ave., LLC*, 109 AD3d 604 [2d Dept 2013] [defendant did not establish *prima facie* violation of Industrial Code absent expert opinion addressing applicability of subsection to facts of case]; *see also Morris v Pavarini Constr.*, 9 NY3d 47 [2007] [meaning of specialized terms in industrial code regulation must sometimes be decided based on evidence, including opinions of experts as

to whether regulation is applicable]).

Moreover, even if this subsection governs paths that are the sole and/or permitted means of access to work trailers, the evidence here shows that this path was not the sole and/or permitted means of access to United Iron's trailer. (*See D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011] [12 NYCRR § 23.1.23 applies where "plaintiff alleged his injuries were caused by a loosely compacted earthen slope that was used to gain access to and from" excavation ditch where construction being performed]; *Sicoli v Riverside Center Parcel 2 Bit Associates, LLC*, 2018 WL 3646974, *3 [Sup Ct, NY County 2018] [gravel ramp which provided only direct access to work area constituted earth ramp]).

In *Doty v Eastman Kodak Co.*, for example, the plaintiff had slid down an embankment, not a ramp or runway, and therefore, 12 NYCRR § 23-1.23 was held not to apply. (229 AD2d 961, 962 [4th Dept 1996], *lv dismissed and denied* 89 NY2d 855 [1996]). And in *Carrera*, where the plaintiff had fallen in an open outdoor area where the ground was made of dirt and rocks, it was found that he had not fallen on an earth ramp. (116 AD3d at 587).

Here, even if the path was an earth ramp, plaintiff testified that it was made of soil that was smoothed down and that the cause of his fall was the accumulation of mud. He therefore neither alleges nor proves that the path or ramp was improperly compacted or was rendered unsafe due to "potholes, soft spots, or excessive unevenness." (*See e.g., Gatto v Plaza Constr. Corp.*, 31 Misc 3d 1228[A], 2011 NY Slip Op 50888[U] [Sup Ct, Nassau County 2011] [as subsection 23-1.23(a) requires that ramps be maintained free of potholes, soft spots, and unevenness, question of fact as to whether it applied to plaintiff's accident where lift on which he was standing dipped into depression in earth made for trench]).

(b). Slope. Earth ramps and runways shall have maximum slopes of one in four (equivalent to 25 percent maximum grades).

Even if the path was an earth ramp, plaintiff offers no evidence as to its grade. (*Cf. Sinkaus v Regional Scaffolding & Hoisting Co., Inc.*, 71 AD3d 478 [1st Dept 2010] [even assuming subsection applicable, defendant submitted evidence that slope of ramp less than 25 percent]).

(d). Earth ramps and runways used by persons. Earth ramps and runways used by persons . . . shall be at least 48 inches in width. Such ramps and runways more than four feet above the adjacent ground, grade or equivalent level shall be provided with safety railings constructed and installed in compliance with this Part (rule). The total rise of any continuous ramp or runway used by persons . . . shall not exceed 12 feet unless such rise is broken by a horizontal section at least four feet in length every 50 feet.

Plaintiff offers no evidence that the path was more than four feet above the adjacent ground or that its total rise exceeded 12 feet. Rather, the testimony and photographs show that the path was part of the ground itself.

3. 12 NYCRR § 23-1.30. Illumination

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.

The area described by plaintiff does not constitute a passageway, stairway, landing or other area where persons are required to pass. (*See Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 [1st Dept 2014] [open, unpaved area where plaintiff walked and tripped on rock not passageway]).

Moreover, plaintiff's testimony that it was dark out and he could not see the ground is insufficient to establish a violation of this subsection. (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [1st Dept 2006] [plaintiff offered no evidence that lighting at issue failed to meet specific standard set forth in subsection, and relied on vague testimony that area was dark];

Carty v Port Auth. of New York and New Jersey, 32 AD3d 732 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007] [same; plaintiff testified lighting was poor and basement was dark]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316 [2d Dept 1997] [plaintiff testified conclusorily that lighting was poor and area was dark]).

In any event, plaintiff did not allege that the lack of lighting caused his accident; rather, he testified that while it was dark out, the cause of his fall was the muddy ground. (*Compare Robbins v Goldman Sachs Headquarters, LLC*, 102 AD3d 414 [1st Dept 2013] [questions of fact existed as to whether insufficient lighting was proximate cause of accident where accident area was very dark and plaintiff did not see warning sign because it was dark]).

Accordingly, United Iron establishes that none of the Industrial Code provisions relied on by plaintiff to sustain his Labor Law § 241(6) claim is applicable here, and plaintiff raises no triable issue thereon nor does he demonstrate a *prima facie* entitlement to judgment.

III. PLAINTIFF'S LABOR LAW § 200 CLAIM

A. Contentions

1. Plaintiff's cross motion for judgment (NYSCEF 462, 487)

Plaintiff contends that defendants violated Labor Law § 200 as the accident was caused by an unsafe condition on the premises, rather than by the means and methods of his work, and defendants either created the condition and/or had actual or constructive notice of it. According to plaintiff, JMA created the unsafe condition by positioning United Iron's trailer next to the uneven path, failed to protect the path from water and mud, failed to maintain it, and failed to provide adequate lighting. JMA had actual notice of the unsafe condition by daily inspections of the site, and its creation of a different path of ingress into the trailer area establishes that it knew that the path was unsafe.

Pike also knew about the unsafe condition through its daily inspections, and it failed to provide a safe path of ingress to United Iron's trailer, which trailer it was obligated to provide to United Iron workers for the work that it was performing for it. Pike also waited months to move the trailer to a safer trailer area.

Plaintiff observes that there is evidence that there had been standing water on the path for approximately two weeks before his accident, that the area routinely flooded when it rained, and that no protective measures were taken to remedy the wet condition, such as by placing gravel on it. It was JMA's responsibility, he maintains, to remove the water or correct the condition.

Plaintiff also argues that there is no evidence controverting his claim that there was no artificial lighting on the path and that it was dark when his accident occurred, and he offers evidence that the sun did not rise that day until approximately a half-hour after his accident. He denies that he was comparatively at fault in using the unsafe path as he had never been told about or told to use the alleged alternate safe path. And, even if there is a triable issue as to his comparative negligence, he is nonetheless entitled to partial summary judgment on liability.

2. BMR's opposition and motion for summary dismissal (NYSCEF 528, 359)

BMR denies that it can be held liable under Labor Law § 200 and common law negligence as it did not directly control or supervise plaintiff's work. It also denies having had notice of the alleged dangerous condition absent evidence of any complaint to JMA about wet or muddy conditions on the path, the steepness of the slope, or insufficient lighting. Nor did JMA "walk" the trailer area for safety, but only the actual worksite.

Moreover, according to BMR, the path on which plaintiff slipped was not constructed or created by JMA to provide ingress and egress from United Iron's trailer. Rather, a safe path was created to enter the trailer, and thus there is no merit to plaintiff's contention that JMA failed to

maintain the path. While plaintiff allegedly was never told of the existence of the safe path or directed to use it, his foreman testified that he was aware of the safe path and that he had himself used it, but failed to direct or instruct United Iron employees to use it. JMA therefore did not "create" an unsafe condition; rather, the unsafe condition was caused by plaintiff's employer's direction to walk on the unsafe path.

BMR denies having had notice of a dangerous condition as the unsafe path was not the intended access point to the United Iron trailer and no one had complained to JMA about it before plaintiff's accident. While JMA employees may have "walked" the worksite to inspect for unsafe conditions, they did not walk the trailer area. Moreover, the sloped path was an open and obvious condition and not inherently dangerous.

3. Pike's opposition and motion for summary dismissal (NYSCEF 329, 530)

Pike denies having created the muddy condition on the slope or having had notice of it, and observes that the accident occurred in JMA's trailer area, over which it had no control or responsibility.

B. Analysis

Absent a dispute that BMR and Pike did not supervise and control plaintiff's work, the pertinent inquiry is whether they created and/or had notice of an unsafe condition. Pursuant to Labor Law § 200, an owner may be held liable for a dangerous condition on premises if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546, 548 [1st Dept 2018]).

Here, there is no evidence that BMR had created the unsafe condition. The mud on which plaintiff had slipped was allegedly caused by rain and/or snow, not by BMR's work or any actions taken by it at the site, and plaintiff neither alleges nor proves otherwise. Nor does

plaintiff prove that the path was unsafe whether or not covered with mud; even if the slope was steep, plaintiff did not testify that the steepness caused him to fall. Rather, he identified the mud as the sole cause of his fall, and testified that the path was "smoothed down."

Moreover, the specific location of the trailer was chosen by United Iron. (*See e.g., Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013] [Labor Law § 200 claim dismissed as, even if plaintiff's injury caused by tripping hazard on sidewalk, hazard was created by his employer's placement of materials on sidewalk]).

Even if BMR had placed United Iron's trailer in the trailer area next to the path, plaintiff identifies no connection between the location of the trailer and the mud on the path. If anything, the location of the trailer merely furnished the occasion for the accident but did not proximately cause it. (*See e.g., Castillo v Amjack Leasing Corp.*, 84 AD3d 1298 [2d Dept 2011], *lv denied* 17 NY3d 711 [2011] [where plaintiff hit by truck in parking lot, alleged negligence by owner in designing or managing lot did not proximately cause accident but furnished occasion for it]).

In any event, the evidence establishes that there was an alternate route to the trailer that did not require plaintiff to walk down the path. That United Iron employees were not informed about the alternative path does not negate the existence of the path.

There is also no evidence that BMR had actual notice of the condition, given the testimony of plaintiff, United Iron, and Garito that they had never complained to BMR before plaintiff's accident about the steepness of the path or of wet or muddy conditions on it, or the lack of lighting. BMR also received no complaints from other workers or Pike, nor were there prior accidents. (*See Lundy v Austen*, 170 AD3d 703 [2d Dept 2019] [dismissal of plaintiff's Labor Law § 200 claim proper as defendants did not create or have notice of alleged uncovered drain hole and inadequate lighting]).

Nor did BMR have constructive notice of the muddy condition, as its employees neither supervised nor patrolled the trailer area for safe conditions. In any event, there is no evidence that the muddy condition had been present and visible and apparent for a sufficient amount of time before plaintiff's accident for BMR to discover and remedy it. Plaintiff did not know if it had been raining before or on the morning of his accident. (*See Rodriguez v Dormitory Auth. of State of New York*, 104 AD3d 529 [1st Dept 2013] [defendant did not have actual or constructive notice of clamp on floor that caused accident, and plaintiff's testimony that he had previously seen similar hazards insufficient absent testimony as to how long specific clamp had been on floor before accident]; *cf. Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043 [2d Dept 2012] [triable issue as to constructive notice raised by evidence that dangerous condition had existed for six months before accident]).

While plaintiff alleges that JMA's project manager admits that the area in front of the trailer always flooded when it rained, the area he identified as always flooding was the alternative route into the trailer area, not the area in front of United Iron's trailer. Similarly, plaintiff claims that there was standing water in front of the trailer for two weeks before his accident, but does not claim that the mud on which he slipped, which was at the top of the slope and not in front of the trailer, was present on the slope before his accident.

For the same reasons, Pike neither created, nor had actual or constructive notice of the unsafe condition. In particular, the trailer had been placed and the path and/or slope created while JMA was in charge of the jobsite, not Pike, and plaintiff's accident had occurred before Pike was given control over the site by JMA. Pike also had no responsibilities related to JMA's trailer area or knowledge of the conditions therein or of complaints to Pike.

IV. UNITED IRON'S MOTION TO DISMISS THIRD-PARTY OR CROSS CLAIMS AGAINST IT (NYSCEF 303)

There is no opposition to this aspect of United Iron's motion.

V. BMR AND PIKE'S MOTIONS FOR INDEMNITY

As United Iron opposes Pike's motion for judgment on its contractual indemnity claim against it solely on the ground that there are triable issues as to Pike's negligence, and given the dismissal of plaintiff's negligence claims against Pike (*see supra* III.A, B), Pike is entitled to contractual indemnity from United Iron.

As BMR only seeks indemnity if there as a finding of negligence against it, given the finding that it was not negligent, BMR's request for indemnity is denied.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant/second third-party defendant United Iron, Inc.'s motion for summary judgment is granted, and plaintiff's Labor Law §§ 240(1) and 241(6) claims are dismissed, and any claims asserted against United Iron for common law indemnity and/or contribution are also dismissed (mot. seq. eight); it is further

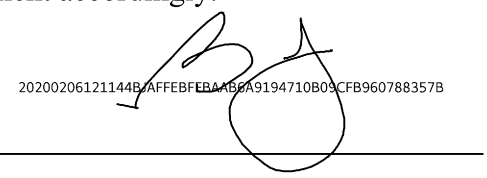
ORDERED, that plaintiff's cross motion for summary judgment is denied; it is further

ORDERED, that defendant/third-party plaintiff Pike's motion for an order summarily dismissing plaintiff's Labor Law §§ 240(1) and 200 and common law negligence claims is granted, and the complaint is dismissed, and judgment is granted on its claim for contractual indemnity against United Iron (mot. seq. nine); it is further

ORDERED, that defendants/third-party plaintiffs BMR-Landmark at Eastview LLC, Biomed Realty Trust, Inc., Biomed Realty, L.P., and John Moriarty & Associates, Inc.'s motion for an order dismissing plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims is granted, and

the complaint is dismissed; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.



2/6/2020
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE