NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

GUOXING SONG,

Plaintiff,

- against-

CA PLAZA, LLC, CA PLAZA LLC d/b/a 134-22 35TH AVE., LLC, W & L GROUP CONSTRUCTION INC., and XYZ CORPORATION,

Defendants.

Index No. 713511/17

Motion Date February 4, 2020

Motion Cal. No.

Motion Seq. No. 5

The following numbered papers read on this motion by plaintiff for summary judgment on the issue of liability against defendants W & L Construction Group (W & L) and CA Plaza, LLC (Plaza).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 79-87
Affirmation in Opposition - Exhibits.....	EF 88-91
Reply Affirmation.....	EF 92-93

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff alleges that he was injured on February 16, 2017,when he slipped on ice while he was working as an employee of nonparty, Ding Li Construction Inc. on a construction project in Flushing, Queens. At the time of the accident, plaintiff was working on what was then the top floor of the building under construction and his worksite was exposed to the elements. According to plaintiff's deposition testimony, he lost his footing and was thrown into a squatting position when he stepped on a patch of ice as he was carrying a wooden form-board to the area where he was creating posts for the next higher floor. Defendant, W & L was the general contractor for the project and defendant Plaza was the owner of the building being constructed.

Plaintiff's complaint alleges causes of action for negligence and violation of Labor Law §§ 200 and 241(6). Where, as here, the injured plaintiff's accident arose from an allegedly dangerous condition at the worksite, liability for a violation of Labor Law § 200, as well as for common-law negligence, requires proof that the defendant either created the dangerous condition or had actual or constructive notice of it. (*See Honeyman v Curiosity Works, Inc., 154 AD3d 820* [2d Dept 2017]*; DeFelice v Seako Constr. Co. LLC,* 150 AD3d 677 [2d Dept 2017].) Plaintiff has not made a *prima facie* showing in support of his contention that defendants had constructive notice of the icy condition which caused him to slip. Contrary to plaintiff's assertion, W & L's daily work log for February 9, 2017 does mention cleaning snow when describing the day's work. No evidence was presented as to the amount of snow which fell that day or of the condition of the worksite thereafter to allow for any conclusions to be drawn about whether the icy condition was caused by the melting and refreezing of ice or snow from precipitation seven days before the accident. Nor does the inadequacy of the testimony of W & L's site manager with regard to establishing when the worksite had been inspected carry plaintiff's burden on its summary judgment motion. The moving party may not rely on gaps in an opponent's proof but must affirmatively establish its claim or defense sufficiently to demonstrate a right to judgment as a matter of law. (*See Spota v Love,* 140 AD3d 730 [2d Dept 2016].) Accordingly , plaintiff is not entitled to summary judgment on his causes of action for negligence and failure to provide a safe work place under Labor Law § 200.

The absence of evidence of actual or constructive notice, however, is irrelevant to the imposition of liability pursuant to Labor Law § 241(6). (*See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740 [2d Dept 2015].) As a predicate for liability pursuant to Labor Law § 241(6), the plaintiff has alleged that he was injured as a result of the presence of an ice condition at his worksite which violated the unequivocal requirement and concrete specification of section 23-1.7(d) of the Industrial Code (12 NYCRR 23-1.7[d]) which provides that "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." (*Id.)*

The duty imposed on owners and contractors by Labor Law § 241(6) is nondelegable. (*See Rizzuto,* 91 NY2d at 350). The plaintiff's testimony at his deposition established that he slipped and was injured as a result of ice at the location where he was performing the tasks assigned to him. The plaintiff thereby demonstrated his prima facie entitlement to judgment as a matter of law on the Labor Law § 241 (6) cause of action. (*See Reynoso,* 125 AD3d at 742.) In opposition, defendants have failed to submit evidence in admissible form to raise a triable issue of fact. (*See Luciano,* 157 AD3d at 617; *Reynoso*, 125 AD3d at 742.)

The excerpt from a purported daily report prepared by W & L for the day of plaintiff's accident is written in Chinese and is not accompanied by a translation with an affidavit setting forth the qualifications of the translator. (CPLR 2101[b]; *see Monteleone v Jung Pyo Hong,* 79 AD2d 988 [2d Dept 2010].) In addition, this hearsay document was not properly qualified as a business record to be admissible under the business record exception to the hearsay rule. (CPLR 4518[a]; *see Federal Natl. Mtge. Assn. v Marlin,* 168 AD3d 679 [2d Dept 2019]; *Citibank, N.A. v Cabrera,* 130 AD3d 861 [2d Dept 2015].) The patient health history questionnaire from the records of plaintiff's treating acupuncturist suffers from similar deficiencies. There is no information as to how the responses included thereon were obtained or who prepared the form, which is written in English, whereas plaintiff is Chinese speaking and required a translator for his deposition. Nor are the acupuncturist's records qualified as business records. Even assuming that the treatment pages of the acupuncturist's records were admissible, the entry therein concerning how the accident occurred upon which defendants rely is not attributed to the injured plaintiff. In any event, had the subject entry referred to statements attributable to plaintiff, the notation was not germane to his diagnosis or treatment and, therefore, would not be admissible under the business records exception to the hearsay rule. (CPLR 4518[a]; *see Sermos v Gruppuso,* 95 AD3d 985 [2d Dept 2012].)

Although inadmissible evidence may be acceptable under certain circumstances to defeat summary judgment, those circumstances are not present here, where the inadmissible evidence is the sole proof offered for the denial of summary judgment and defendants have not given any excuse for their failure to tender that evidence in admissible form. (*See Vaccariello v Meineke Car Care Ctr., Inc.,* 136 AD3d 890 [2d Dept 2016]; *Kristo,* 134 AD3d at 551; *Weinstein v Nicolosi,* 117 AD3d 1036 [2d Dept 2014..)

Accordingly, plaintiff's motion is granted only to the extent that he is awarded summary judgment against defendants W & L and Plaza on the issue of liability on his cause of action for violation of Labor Law § 241(6).

Dated: May 7, 2020

DARRELL L. GAVRIN, J.S.C.

FILED

5/15/2020
12:55 PM

COUNTY CLERK
QUEENS COUNTY