At IAS Part 99, at the Kings County Courthouse, 360 Adams St., Brooklyn, NY 11201, on the _____ day of _____ 2022

MAY 22 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MATTHEW MILLIGAN,

Plaintiff,

-against-

606 WEST 57 LLC, TFC WEST 57 GC LLC, EE 57TH STREET SOUTH HOLDINGS LLC, FADLING II LLC, and APPLEBY SOUTH HOLDINGS LLC,

Defendants.

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DECISION/ORDER

Index No.: 521031/2017
Motion Date: 9/7/2022
Motion Cal. No.: 33
Mot. Seq. 7

After oral arguments, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendants' Motion to Reargue, dated June 24, 2022; Affidavit of Attorney Abigal Rossman, affirmed on June 24, 2022; this Court's Decision and Order, dated May 23, 2022	155-160
Plaintiff's Attorney's Affirmation of Jeffrey B. Bromfeld in Opposition, affirmed on August 29, 2022	161
Defendant's Attorney's Reply Affirmation of Attorney Abigal in Reply, affirmed on 9/6/2022.....	162

In this labor law action, defendants move to reargue this court's decision and order dated May 23, 2022 which, *inter aila*, upon a search of the record, granted summary judgment in favor of plaintiff with respect to the Labor Law § 241(6) claim based on a violation of Industrial Code provision 12 NYCRR 23- 1.7(e)(1); denied plaintiff's motion for summary judgment with respect to the Labor Law § 241(6) claim based on a violation of Industrial Code provision 12 NYCRR 23- 1.7(e)(2) as the court found a question of fact; and denied defendants' joint motion for summary judgment to dismiss plaintiff's claims arising under Labor Law § 200, common-law negligence, and Industrial Code provisions 12 NYCRR 23- 1.7(e)(1), 12 NYCRR 23- 1.7(e)(2), and 12 NYCRR 23-2.1(a)(1).

Defendants first move to reargue the branch of their motion for summary judgment on plaintiff's Labor Law § 200 and common law negligence claim. Defendants EE 57th Street South Holdings LLC, Fadling II LLC, and Appleby-South Holdings LLC, are the owners and landlords of the premises. With respect to owners and landlord defendants, Frank Vasta, officer of defendants 606 West 57 LLC and TFC West 57 GC LLC, submitted an affidavit in support. That affidavit states that the "Landlords did not have any presence at the project, involvement with the work performed nor enter into any contracts with various trades related to the construction project. The

Landlords' role was limited exclusive to ground lessors with no involvement in the project." (NYSCEF #141, page 2).

"An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute or assumed by contract or a course of conduct[.]" *Quituizaca v. Tucchiarone*, 115 A.D.3d 924, 925, 982 N.Y.S.2d 524, 526 (2d Dep't 2014) (quoting *Madry v. Heritage Holding Corp.*, 96 A.D.3d 1022, 1023, 947 N.Y.S.2d 588 [2d Dep't]).

Here, the Section 14.4 of contract between the owner and landlord defendants EE 57th Street South Holdings LLC, Fadling II LLC, and Appleby-South Holdings LLC and tenant defendant 606 West 57 LLC states:

> Landlord shall not be required to furnish any services, utilities or facilities whatsoever to the Premises, nor shall Landlord have any duty or obligation to make any alteration, change, improvement, replacement, restoration or repair to, nor to demolish, the Improvements . . . Tenant assumes the full and sole responsibility for the condition, operation, repair, alteration, improvement, replacement, maintenance, and management of the Premises.

(NYSCEF #141, page 90). Section 22.1 of the same lease states "Tenant shall permit Landlord . . . from time to time to enter the Premises . . . upon reasonable prior notice to Tenant for the purpose of inspecting the same . . . subject to Tenant's safety requirements." (NYSCEF #141, page 100). Section 22.2 explicitly states that the right to enter implies no duty on the landlord-defendants to do any work. (*Id.*).

Accordingly, there is no duty imposed by contract nor does it contain any language that establishes the necessary control to impose liability under Labor Law § 200 or common law negligence as to defendants EE 57th Street South Holdings LLC, Fadling II LLC, and Appleby-South Holdings LLC. Similarly, there is nothing in the record that demonstrates that these defendants had a duty by statute, assumed one by conduct, exercised control over the method and means of the work performed, created the dangerous condition, or had constructive or actual notice of the condition. The Labor Law § 200 and common law negligence claims against defendants EE 57th Street South Holdings LLC, Fadling II LLC, and Appleby-South Holdings LLC are dismissed, and the court's previous decision and order is modified accordingly.

With respect to tenant-defendant 606 West 57 LLC, defense counsel states that it was not involved or present at the project whatsoever, and "could not have created or had notice of the condition as [it was] not involved or present at the project." However, the lease between owner and landlord-defendants and tenant-defendant 606 West 57 LLC directly contradicts this, as demonstrated above in Section 14.4 of the lease. Further, tenant-defendant 606 West 57 LLC had a contractual duty under the lease to, "at its sole cost and expense, put and keep in good condition and repair the Premises . . . [and] keep the same in good and safe order and condition[.]" (NYSCEF #141, page 89).

While Frank Vasta's affidavit does state that 606 West 57 LLC lacked actual notice, his affidavit does not sufficiently refute constructive notice. His affidavit stated that 606 West 57 LLC was not involved in the day-to-day construction at the site, but he does not state whether they were present at the worksite, specifically on or near the date of plaintiff's accident. Moreover, this is inconsistent with the lease between 606 West 57 LLC and owner and landlord-defendants. Frank Vasta's affidavit made no mention of 606 West 57 LLC's presence at the project on the date in question, when the last time the area was inspected by said defendant, or whether he knew the condition of the stairwell and landing on the day of the accident. Similarly, Frank Vasta's affidavit falls short with respect to demonstrating that defendant TFC West 57 GC LLC, the general contractor, lacked constructive notice.

Chris Steinman, the site superintendent, testified that he was on site daily during the time of plaintiff's accident and performed daily inspections. (NYSCEF #125, 42). He testified that he had authority to control and dictate safety protocol for TFC West 57 GC LLC. (*Id.* at page 54-55). However, he testified that he did not know if he was on the jobsite on the day in question, but that this could be verified by his Daily Report. (*Id.* at page 40-41). Chris Steinman testified that his Daily Reports logged his daily inspections and included details about the weather, activities on the jobsite, and workers present. (*Id.* at page 41). However, defendants failed to produce the Daily Report from the day of the accident or the workday before, which would have some probative value as this accident happened in the beginning of the workday around at 7 a.m. Chris Steinman testified that he had never seen a cinderblock in the area where the accident occurred (*Id.* at page 34), but this does not establish a lack of constructive notice as to TFC West 57 GC LLC because a question of fact remains as to whether Chris Steinman was present at the jobsite on the date in question. Defendant TFC West 57 GC LLC failed to offer any other evidence that would prove, as a matter of law, that they lacked constructive notice.

The court acknowledges that plaintiff did not see the cinderblock on his way into work around 6:00 a.m. or offer any evidence that defendants did in fact have notice. However, this is defendants' motion for summary judgment on the issue of liability under Labor Law § 200 and common law negligence and it is therefore defendants' burden to establish, as a matter of law, that they lacked constructive notice. Defendants 606 West 57 LLC and TFC West 57 GC LLC failed to offer any evidence of what the condition of the staircase or landing was on the day in question, or any evidence of when the area was last inspected. *White v. Vill. of Port Chester*, 92 A.D.3d 872, 876, 940 N.Y.S.2d 94, 98 (2d Dep't 2012); *Wolfe v. KLR Mech., Inc.*, 35 A.D.3d 916, 919, 826 N.Y.S.2d 458, 461 (3d Dep't 2006). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *Dalton v. Educ. Testing Serv.*, 294 A.D.2d 462, 463, 742 N.Y.S.2d 364, 365 (2002).

Accordingly, defendants 606 West 57 LLC and TFC West 57 GC LLC have not met their burden of establishing, as a matter of law, that they lacked constructive notice of the cinderblock, and therefore the burden did not shift to plaintiff to establish that defendants did in fact have constructive notice. *Vella v. One Bryant Park, LLC*, 90 A.D.3d 645, 646–47, 935 N.Y.S.2d 31, 32–33 (2d Dep't 2011).

Next, defendants argue that plaintiff did not "trip" within the meaning of the 12 NYCRR 23-1.7(e)(1) because he stepped on the cinderblock. The court has reviewed the defendants' contention that the way plaintiff fell is not a "trip" and finds that argument without merit. This court considers plaintiff's fall a "trip" regardless of whether he explicitly said the word "trip." Plaintiff testified that, without seeing the cinderblock, he stepped on said cinderblock and the cinderblock flipped causing plaintiff's ankle to roll and causing plaintiff to fall into the wall. The court also affirms its finding that a cinderblock on a landing in front an ingress/egress is a "tripping hazard" as contemplated by the Industrial Code.

Moreover, the cases cited by defendants to argue that plaintiff's accident is not a "trip" within the meaning of the Industrial Code are unavailing. In *McKee v. Holt Constr. Corp.*, 59 Misc. 3d 1234(A), 109 N.Y.S.3d 568 (N.Y. Sup. Ct. 2018), the plaintiff's foot fell in a hole. In *Keener v. Cinalta Const. Corp.*, 146 A.D.3d 867, 868, 45 N.Y.S.3d 179 (2d Dep't 2017), the "the plaintiff testified at his deposition that he did not trip." In *Velasquez v. 795 Columbus LLC*, 103 A.D.3d 541, 959 N.Y.S.2d 491 (1st Dep't 2013), plaintiff slipped on a muddy condition that the court held was an applicable predicate for the Labor Law § 241(6) claim. In *Gaspar v. Pace Univ.*, 101 A.D.3d 1073, 1074, 957 N.Y.S.2d 393 (2d Dep't 2012), plaintiff fell from a ladder.

Defendants also argue that the stairwell landing where plaintiff tripped is not a "passageway" within the meaning of 12 NYCRR 23-1.7(e)(1) because the staircase was one of several ingress/egress points that led to access to the 11th Avenue project entrance/exit. Defendants rely on *Rossi v. 140 W. JV Mgr. LLC*, 171 AD3d 668 (1st Dep't 2019) to argue that a particular access route cannot be a passageway unless there are no other possible routes of ingress/egress to access the work area. In *Rossi*, the First Department determined that the "area where plaintiff fell was, by definition, a passageway, as he tripped over Vanquish's demolition debris along the only route he could take to return to his work area with a ladder." *Id.* While the facts in *Rossi* involve a passageway that was the plaintiff's only route, it does not stand for the proposition that for an area to constitute a "passageway" it *must* be the only route one can take to access the work area.

Nor do the Second Department cases relied on by defendants stand for this proposition. *Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 322, 772 N.Y.S.2d 74 (2d Dep't 2004) holds that an open working area (a roof) is not a passageway, inapplicable here as the accident occurred in an interior stairwell. In *Parker v. Ariel Assocs. Corp.*, 19 A.D.3d 670, 672, 798 N.Y.S.2d 489 (2d Dep't 2005), plaintiff was injured while working on the ground floor of the construction site and was not using the area as a passageway when the accident occurred, distinguishable from the present facts as plaintiff here was using the stairwell as means of passage. Similarly, the plaintiff in *Salinas v. Barney Skanska Const. Co.*, 2 A.D.3d 619, 622, 769 N.Y.S.2d 559, 562 (2d Dep't 2003) was not using the area as passageway when the incident occurred. Defendants have failed to provide any case law that supports the proposition that for an area to be a "passageway" within the meaning of 12 NYCRR 23-1.7(e)(1), it must be the only route of ingress/egress to access the work area.

All other arguments in the moving papers were addressed and decided in the court's previous decision, dated May 23, 2022.

Based on the foregoing, it is

ORDERED that defendants' joint motion to reargue is **GRANTED**, and, upon reargument, it is

ORDERED, that defendants' joint motion for summary judgment to dismiss plaintiff's claims arising under Labor Law § 200 and common law negligence is **GRANTED** only with respect to owner and landlord defendants EE 57th Street South Holdings LLC, Fadling II LLC, and Appleby-South Holdings LLC; and it is further

ORDERED that all other request to modify the court's previous decision and order dated May 23, 2022 is **DENIED** and the court adheres to the previous decision in all other respects.

This constitutes the decision and order of the Court.

ENTER

Hon. Richard J. Montelione, J.S.C.