At an IAS Term, Part 99 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 10th day of June, 2024.

PRESENT:

HON. RICHARD J. MONTELIONE,
Justice.

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KENNY SMITH,

Plaintiff,

-against-

NEW YORK PRESBYTERIAN BROOKLYN METHODIST HOSPITAL and NEW CELLULAR WIRELESS PCS, LLC,

Defendants.

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DECISION AND ORDER

Index No.: 506951/19

MS#s 8, 10, 11

Cal. #s 65-67

Date Argued: 2/7/2024

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ *Petition/Cross Motion and* Affidavits (Affirmations) Annexed	164-165, 211-214, 250-251, 253, 294, 298 230-232, 288,
Opposing Affidavits/Answer (Affirmations)	290, 293, 295-297, 300, 301, 314
Affidavits/ Affirmations in Reply	299, 303, 315
Other Papers:	

Relief Sought

Upon the foregoing papers, plaintiff Kenny Smith moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor with respect to liability on his Labor Law §§ 200 and 241 (6) causes of action as against defendant New York-Presbyterian/Brooklyn *Methodist s/h/a New York Presbyterian Brooklyn Methodist*

Hospital (NY Presbyterian) (motion sequence number 8). NY Presbyterian cross-moves for an order, pursuant to *Brill v City of New York*, granting it leave to make a late motion for summary judgment, and, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims as asserted against it (motion sequence number 10). Defendant New Cingular Wireless PCS, LLC (New Cingular) moves for an order, pursuant to *Brill v City of New York*, granting it leave to file a late motion for summary judgment, and, pursuant to CPLR 3212, granting summary judgment (a) dismissing plaintiff's complaint and all cross claims asserted against it, and (b) in its favor on its contractual indemnity and common-law indemnity cross-claims as against NY Presbyterian (motion sequence number 11).

Summary of Disposition

Plaintiff's motion (motion sequence number 8) is denied.

NY Presbyterian's cross-motion (motion sequence number 10) is granted to the extent that (a) the court will entertain its late request for summary judgment, and (b) plaintiff's Labor Law § 241 (6) cause of action is dismissed as against it. NY Presbyterian's cross-motion is otherwise denied.

New Cingular's motion seeking summary judgment (motion sequence number 11) is untimely but the court will, nonetheless, upon searching the record, dismiss plaintiff's Labor Law § 241 (6) cause of action as against it.

Background

Plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200 and 241 (6) based on injuries he allegedly sustained on

January 31, 2019, when he slipped and fell on ice on the roof of a hospital building (Property) owned by NY Presbyterian. Pursuant to a lease agreement with NY Presbyterian dated April 11, 2001 (Lease), New Cingular installed cell phone antennas and related equipment on the roof of the Property in order to receive and transmit cellular telephone signals.[1] At some point in January 2019, a portion of New Cingular's transmission/reception system was not working, and after one of its technicians examined the system but was unable to fix the issue, New Cingular reached out to one of its venders, non-party Allied Telecom (Allied), to address the issue.

On January 31, 2019, Allied assigned two of its technicians, plaintiff and his coworker, Daniel Czaplinski, to perform the work. According to plaintiff's deposition testimony, plaintiff and Czaplinski drove to the Property in their assigned work van, and arrived at around 9:30 a.m. A person at NY Presbyterian's security desk told plaintiff how to access the roof, and plaintiff and Czaplinski thereafter rode up on an elevator and exited a door onto the flat roof. The antenna sector was located behind a shelter that covered some of New Cingular's equipment. After re-running a wire, and performing some troubleshooting for approximately 30 minutes, plaintiff realized that he needed to go back down to the van for some additional parts. As he was walking back across the roof towards the door to re-enter the building and access the elevator, plaintiff stepped forward with his left foot, and his right foot rolled under him, causing him to fall to the ground. Although he did not notice any ice while he was walking, immediately after the

[1] The Lease had a five-year term and contained a provision providing that it could be renewed for five additional five year terms.

accident plaintiff observed that he had fallen in a circle of ice, which had a diameter of approximately eight feet and the imprints of foot-prints thereon. Relevant to the ice, plaintiff testified that it was cold the day before the accident, but that he did not recall any precipitation. Plaintiff further testified that although it was sunny on the morning of the accident, temperatures were very cold.

Plaintiff's deposition testimony and that of New Cingular's witnesses show that the ultimate repair performed by Allied involved the replacement of a component part called a remote radio head.[2] Plaintiff, in his testimony, stated that while he did not know how long such devices generally last, he might end up replacing up to two such devices a week. Plaintiff estimated that it takes an hour to an hour and a half to replace a radio head and stated that the work involves ensuring that the fiber optic cables and 12-volt dc-power connections are properly made. One of New Cingular's witnesses, Kevin Brown, testified at his deposition that he did not now how long radio heads last in general. Brown noted, however, that some radio heads can last years, while others fail rather quickly. Anthony Saraniero, a New Cingular supervisor, testified that a remote radio head is a 70-to-80-pound component part that wears out from time to time. While Saraniero stated that replacing a radio head is more involved than replacing a light bulb and requires

[2] The court notes that plaintiff testified, at his deposition, that he did not know how it was determined that the remote radio head was not working. Plaintiff's knowledge that the work ultimately involved the replacement of the remote radio head was based on the work ticket for the job. Plaintiff, however, could not recall what stage of the work he and his partner were at when the accident happened. Plaintiff did recall that the connection was not restored until after the accident occurred. Based on the work ticket and the testimony of the New Cingular witnesses, it appears that Czaplinski, plaintiff's coworker, completed the work at some point that day after plaintiff was taken to the NY Presbyterian's emergency room. Of note, another New Cingular witness, Travis Walker, testified, based on his notes of communications with Allied, that another Allied crew had visited the premises on January 21, 2019, but were not able to finish the work at that time because they needed to order the remote radio head. Allied thereafter ordered the remote radio head and had it available by January 28, 2019.

specialized training to properly connect the fiber optic cable and direct current (DC) power source, it does not involve the stripping of cables.

Discussion

The court first turns to defendants' respective requests that this court find good cause for consideration of their untimely motions, each of which were made more than 10 *months after the plaintiff filed his note* of issue on September 26, 2022.

With respect to NY Presbyterian, it asserts that it has demonstrated good cause based on the existence of outstanding discovery, which discovery included the deposition of Saraniero, *which was not held until June 6, 2023. Relevant* to its argument, in October of 2022, NY Presbyterian timely moved to vacate the note of issue, arguing that discovery was not complete, and, alternatively, sought to extend the time to move for summary judgment. In an order dated November 10, 2022, *the court denied both requests* but granted the portion of the motion requesting that New Cingular be compelled to produce additional witnesses. Only after an additional motion by NY Presbyterian and a court order directing the depositions did New Cingular's witnesses appear. *Since* Saraniero's testimony provides evidence relevant to whether plaintiff was performing covered work within the meaning of Labor Law § 241 (6) and given that NY Presbyterian moved for summary judgment relatively promptly after the final deposition, this court finds that NY Presbyterian has demonstrated good cause warranting consideration of its motion (*see Panfilow v 66 E. 83rd St. Owners Corp.*, 217 AD 3d 875, 877-878 [2d Dept 2023]; *cf. Ragoonanan v 43-25 Hunter, LLC*, 214 AD3d 831, 832 [2d Dept 2023]). Additionally, the court finds that it can consider NY Presbyterian's cross-motion because

it is made on grounds that are nearly identical to those raised in plaintiff's timely motion (*see Sammy Properties, Inc. v Al Saleh Assoc., LLC*, 225 AD3d 815, 818 [2d Dept 2024]; *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]).

On the other hand, New Cingular has failed to demonstrate good cause warranting consideration of its cross-motion. New Cingular may not rely on the fact that there was outstanding discovery given that it appears that (a) it was responsible for at least some of the delay, and (b) the depositions at issue involved witnesses within its control who could have provided the information to it at any time (*see Espejo v Hiro Real Estate Co.*, 19 AD3d 360, 361 [2d Dept 2005]; *see also Beni v Green 485 TIC LLC*, 144 AD3d 613, 614 [1st Dept 2016]). The testimony of New Cingular witnesses also has little bearing on New Cingular's arguments for summary judgment (*see Ragoonanan*, 214 AD3d at 832; *Navarro v Damac Realty, LLC*, 202 AD3d 1100, 1101 [2d Dept 2022]) and the arguments it raises (for example, that it owed no duty to plaintiff to remove any snow or ice) are not nearly identical to the arguments raised by plaintiff in his motion and NY Presbyterian in its cross-motion (*see Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 732 [2d Dept 2024]; *Sheng Hai Tong*, 144 AD3d at 890). Nonetheless, the court may, in its discretion, search the record and grant summary judgment to, among others, a non-moving party (CPLR 3212 [b]).

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 (b); *Gilbert Frank Corp. v*

Federal Ins. Co., 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought (*Spinelli v Procassini*, 258 AD2d 577 [2d Dept 1999]; *Tassone v Johannemann*, 232 AD2d 627, 628 [2d Dept 1996]; *Weiss v. Garfield*, 21 AD2d 156, 158 [3d Dep't 1964]). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact *(Alvarez v Prospect Hosp*, 68 N.Y.2d 320 [1986]; *Zuckerman v City of New York, supra at 562; Friends of Animals, Inc . Associated Fur Mfrs, Inc*, 46 NY2d 1065 [1979]).

On the merits, both plaintiff's motion and NY Presbyterian's cross-motion address plaintiff's Labor Law § 241 (6) cause of action. Under section 241 (6), an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). NY Presbyterian, in cross-moving and in opposing plaintiff's motion, asserts that section 241 (6) is inapplicable because plaintiff's work did not involve work covered under that section while plaintiff, in moving and opposing NY Presbyterian's cross-motion, asserts that his work involved covered repair work.

The standard for work covered under Labor Law § 241 (6) is most fully explained in the Court of Appeals decision in *Nagel v D & R Realty Corp.* (99 NY2d 98 [2002]). The plaintiff, in *Nagel*, was injured while performing a two-year elevator safety

inspection that involved checking to see if the elevator's brakes worked, a process that would take approximately two hours (*id.* at 99-100). Although the Court noted that the Industrial Code contains a broad definition of construction work that includes alteration, repair and maintenance of buildings or other structures (12 NYCRR 23-1.4 [b] [13]),[3] it ruled that this broad definition must be considered in conjunction with section 241 (6)'s statutory requirement that it applies to accidents that "occur in the context of construction, demolition and excavation" (*Nagel*, 99 NY2d at 103). Under this standard, the Court found that plaintiff's injuries "did not occur in the context of construction, demolition or excavation at any site" (*Nagel*, 99 NY2d at 103).

In *Esposito v New York City Indus. Dev. Agency* (1 NY3d 526 [2003]), the Court of Appeals reiterated this definition of covered work under Labor Law § 241 (6). The Court, in *Esposito*, held that a maintenance worker's work on an air conditioner unit that included the replacement of component parts that had worn out in normal use constituted routine maintenance within the meaning of Labor Law § 240 (1). Rather than rely on the routine maintenance standard it applied under section 240 (1) for purposes of section 241 (6) liability, the Court proceeded to hold that the maintenance employee's work was not covered under section 241 (6) because it did not occur in the context of construction, demolition, or excavation (*Esposito*, 1 NY3d at 528).

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[3] 12 NYCRR 23-1.4 (b) (13) provides that, "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

Here, in view of the testimony in the record regarding the nature of plaintiff's work that involved the replacement of a remote radio head, a component part of New Cingular's cell phone reception and transmission system, NY Presbyterian has demonstrated, prima facie, that plaintiff's work did not involve any construction, demolition or excavation work and is thus not covered under Labor Law § 241 (6) (*see Esposito*, 1 NY3d at 528; *Nagel*, 99 NY2d at 103; *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 688-689 [2d Dept 2021]; *Lopipero v MTA Long Is. Rail Rd.*, 178 AD3d 813, 815 [2d Dept 2019]; *Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747, 749 [2d Dept 2019]; *Mata v Park Here Garage Corp.*, 71 AD3d 423, 424 [1st Dept 2010]; *Alexander v Hart*, 64 AD3d 940, 944-945 [3d Dept 2009]; *Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 640 [1st Dept 2009]; *Chuchuca v Redux Realty*, 303 AD2d 239, 239-240 [1st Dept 2003]).[4]

There are, however, Appellate Division, Second Department decisions that, while referring to the construction, demolition or excavation language of Labor Law § 241 (6), emphasize the expansive definition of construction contained in 12 NYCRR 23-1.4 (b) (13) that includes repairs and maintenance as construction work, and expressly (or at least effectively) determine the issue based on the routine maintenance verses repair standard of Labor Law § 240 (1) (*see e.g. Ricottone v PSEG Long Island, LLC*, 221 AD3d 1032,

[4] In application, this standard under Labor Law § 241 (6) can be stricter than the standard for covered repair or non-covered routine maintenance under Labor Law § 240 (1). In this regard, there are several Appellate Division cases in which the courts have held that there were at least factual issues as to whether work was covered as a repair under section 240 (1), but held, as a matter of law, that the work did not constitute work occurring in the context of construction, demolition, or excavation under section 241 (6) (*see Cantalupo*, 194 AD3d at 688-689; *Barrios*, 169 AD3d at 749; *Mata*, 71 AD3d at 424; *Alexander*, 64 AD3d at 944-945; *Caban*, 63 AD3d at 640; *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987-988 [3d Dept 2009]).

1034-1035 [2d Dept 2023]; *Nusio v Legend Autorama, Ltd.*, 219 AD3d 842, 845 [2d Dept 2023]; *Wass v County of Nassau*, 173 AD3d 933, 935 [2d Dept 2019]; *De Jesus v Metro-North Commuter R.R.*, 159 AD3d 951, 953 [2d Dept 2018]). Assuming that this repair verses routine maintenance standard governs, this court finds that NY Presbyterian has demonstrated, prima facie, that the work at issue involving the replacement of a component part that could fail as the result of normal wear and tear constituted routine maintenance that is not covered work under section 241 (6). In reaching this conclusion, this court finds that plaintiff's work here is not meaningfully distinguishable from the work at issue in cases addressing similar work such as *Stockton v H&E Biffer Enters. No. 2, LLC* (196 AD3d 709 [2d Dept 2021], *lv denied* 38 NY3d 912 [2022]), which involved the replacement of a refrigerator condenser fan motor (*id.* at 710-711), *Cremona v Venture Holding & Mgt. Corp.* (189 AD3d 994 [2d Dept 2020]), which involved the replacement of malfunctioning electronic switches (*id.* at 995), *Dahlia v S&K Distrib., LLC* (171 AD3d 1127 [2d Dept 2019]), which involved replacing a belt (*id.* at 1129), or *Gallello v MARJ Distribs., Inc.* (50 AD3d 734 [2d Dept 2008]), which involved replacing a broken transformer (*id.* at 735).[5]

As plaintiff has failed to submit evidence in opposition demonstrating the existence of a factual issue as to whether his work occurred within a construction context or constituted more than routine maintenance, NY Presbyterian is entitled to summary

[5] While this court believes that the facts in this case are closely akin to those in *Stockton*, *Cremona*, *Dahlia*, or *Gallello*, and would warrant a finding of routine maintenance, the court notes that other Appellate Division cases have found the existence of factual issues based on work that bears some similarity to the work at issue here (see *Green v Evergreen Family Ltd. Partnership*, 210 AD3d 1496, 1496-1497 [4th Dept 2022]; *Hamm v Review Assoc., LLC*, 202 AD3d 934, 936-937 [2d Dept 2022]; *Wass*, 173 AD3d at 935; *Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2d Dept 2017]; *Roth v Lenox Terrace Assoc.*, 146 AD3d 608, 608 [1st Dept 2017]).

judgment dismissing plaintiff's Labor Law § 241 (6) cause of action. For these same reasons, plaintiff's motion for summary judgment in his favor on his section 241 (6) cause of action must be denied. Further, although this court finds that New Cingular did not demonstrate good cause in failing to timely bring its summary judgment motion, it, nonetheless, in searching the record, dismisses the section 241 (6) claim as against New Cingular (*see Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dept 2021]; *Rivera v Port Auth. of N.Y. & N.J.*, 69 AD3d 917, 918-919 [2d Dept 2010]; CPLR 3212 [b]).

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action as against NY Presbyterian, plaintiff has pleaded these claims pursuant to a dangerous premises condition theory of liability and makes no assertion that NY Presbyterian supervised or controlled his work. In any event, the record demonstrates that NY Presbyterian may not be held liable pursuant to a methods and materials theory of liability since the evidence shows that NY Presbyterian did not exercise supervisory control over the work (*see Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022]; *see also Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). As such, this case is clearly governed by the standard for premises liability under which property owners may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see*

also Minorczyk v Dormitory Auth. of the State of N.Y., 74 AD3d 675, 675-676 [1st Dept 2010]).

Initially, contrary to NY Presbyterian's contention and despite this court's finding with regard to Labor Law § 241 (6), Labor Law § 200 applies to plaintiff's work because plaintiff was employed within the meaning of section 200 (*see Daniello v Holy Name Church*, 286 AD2d 268, 268-269 [1st Dept 2001]; *cf. Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577 [1990]), which is not limited to construction work (*see Jock v Fien*, 80 NY2d 965, 967 [1992]; *Rocha v GRT Constr. of N.Y.*, 145 AD3d 926, 928 [2d Dept 2016]). NY Presbyterian owed a duty to safely maintain the roof access to New Cingular's equipment. This duty arises because, under the terms of its Lease with New Cingular, NY Presbyterian retained an obligation to allow New Cingular and its employees and subcontractors access for the maintenance and operation of its facilities and to maintain the Property, including that portion of the roof leased to New Cingular for its communications fixtures and related equipment (Lease at ¶¶ 1, 11, 13).[6] Additionally, in view of the Lease, it was foreseeable that New Cingular or its subcontractors would need to access the roof to maintain its equipment (*see Kimen False*

[6] With respect to access, the Lease, at ¶ 11, provides, as is relevant here, "[a]t all times throughout the Term of this Agreement, and at no additional charge to Tenant [New Cingular], Tenant and its employees, agents, and subcontractors, will have twenty-four hour, seven day access to and over the Property [the portion of the Property not leased to New Cingular], from an open and improved public road to the Premises [the portion leased to New Cingular], for the installation, maintenance and operation of the Communication Facility and any utilities serving the Premises." In view of the language "to and over the Property," this Lease provision applies to the means of accessing the equipment on the roof, and, contrary to NY Presbyterian's contention, is not limited to insuring access via an improved public road. Regarding maintenance, the Lease, at ¶ 13 (a), requires NY Presbyterian to "maintain and repair the Property and access thereto, in good and reasonable condition, subject to reasonable wear and tear and damage from the elements."

Alarm, Ltd., 69 AD3d 579, 580-581 [2d Dept 2010]; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993])).

NY Presbyterian primarily argues that plaintiff's claim is barred by the storm-in-progress rule. The certified meteorological records submitted by NY Presbyterian show that there was a mix of rain and snow on January 29, 2019, and that the last precipitation before plaintiff's accident was approximately 0.5 inches of snow that fell between 3:00 p.m. and 5:00 p.m. on January 30, 2019. These records show that the temperature on January 30, 2019, while 35 degrees at 1:00 a.m., dropped to 32 degrees by 1:51 a.m., was 22 degrees at 10:00 a.m., was 33 degrees at 1:51 p.m. and 2:51 p.m., was 31 degrees by 3:38 p.m., and was 24 degrees by 4:06 p.m. The temperature continued to drop throughout the night of January 30, 2019, and into the morning of January 31, 2019, and reached a low of 4 degrees at 4:51 a.m. As of the time of plaintiff's accident, the temperature was still only in the mid-teens. NY Presbyterian's expert meteorologist asserts that, because the temperature reached 33 degrees at 2:00 p.m. and remained slightly above 32 degrees for over an hour, any ice that was present at the time of plaintiff's accident was the result of moisture on the roof freezing over the night of January 30, 2019, through the morning of January 31, 2019. However, in view of the size of the ice patch present in the photographs that plaintiff identified as showing the ice condition on the roof at the time of the accident, NY Presbyterian's expert meteorologist's conclusory assertion that any preexisting ice would have melted during the hour or two that temperatures were only slightly above freezing on January 30, 2019, fails to demonstrate such fact as a matter of law (*see Massey v Newburgh W. realty, Inc.*,

84 AD3d 564, 566 [1st Dept 2011]). Moreover, the detailed affidavit of plaintiff's meteorologist, which suggests that the ice at issue was the result of pooling water and slush that had been present on the roof for several days, and which, in view of the freezing temperatures on the morning of January 30, 2019, would have turned to ice by 5:30 a.m. on January 30, 2019, is sufficient to demonstrate a factual issue regarding how long the ice had been present (*see Daniel v East Williston Union Free Sch. Dist.*, 180 AD3d 750, 751-752 [2d Dept 2020]; *Gervasi v Blagojevic*, 158 AD3d 613, 614 [2d Dept 2018]).[7]

In any event, even if the ice only formed after 3:00 p.m. on January 30th, the affidavit of the NY Presbyterian's meteorologist fails to demonstrate that the ice condition was the result of a storm in progress on the morning of the accident or that the ice was not present for a sufficient amount of time for NY Presbyterian to discover and remedy it (*see Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397-1398 [4th Dept 2017]). Notably, in this regard, plaintiff's testimony regarding the large size of the ice patch and the presence of footprints in it after he fell is sufficient, despite his testimony that he did not notice it before his fall, to suggest that it could have been observed by someone inspecting the area (*see Wood v Buffalo & Fort Erie Pub. Bridge Auth.*, 178 AD3d 1383, 1384 [4th Dept 2019]; *Tate v Golub Props., Inc.*, 103 AD3d 1080, 1081 [3d Dept 2013]; *cf. Nass v City of New York*, 210 AD3d 684, 686 [2d Dept 2022]). As such, in the absence of any evidence showing when it last inspected the area, NY Presbyterian

[7] While the copies of the meteorological records submitted with the report of plaintiff's meteorologist are not certified and thus not admissible (*see Morabito v 11 Park Place LLC*, 107 AD3d 472, 472 [1st Dept 2013]), the court will consider the affidavit of plaintiff's meteorologist since the majority of the opinions contained therein are based on facts contained in the certified meteorological records submitted by defendants.

has failed to demonstrate, prima facie, that it lacked actual or constructive notice of the ice condition on the roof (*see Islam v City of New York*, 218 AD3d 449, 450-451 [2d Dept 2023]; *Edwards v Genting N.Y. LLC*, 217 AD3d 749, 749-750 [2d Dept 2023]; *Steffens v Sachem Cent. Sch. Dist.*, 190 AD3d 1003, 1004-1005 [2d Dept 2021]; *Santoliquido v Roman Catholic Church of Holy Name of Jesus*, 37 AD3d 815, 815-816 [2d Dept 2007]).

Finally, NY Presbyterian, in essence and based on the assertions of its expert engineer, argues that it could not have done anything about the ice condition on the roof since snow melt and/or sharp objects could not have been used to remove the ice because they would damage the roof. To the extent that this argument may constitute a basis for avoiding liability, plaintiff has demonstrated the existence of a factual issue in this regard through an affidavit from an expert engineer who asserts that the danger presented by ice conditions on the roof could have been addressed by obtaining a commercially available matting system to provide a non-slip pathway on the roof (*see Lesocovich*, 81 NY2d at 985). Contrary to NY Presbyterian's assertions, given its above noted obligation under the lease to maintain access to New Cingular's equipment, it cannot avoid liability for any such failure by simply asserting it was New Cingular's responsibility to provide such a non-slip pathway.

Accordingly, this court finds that these factual issues require denial of the portion of NY Presbyterian's cross-motion addressed to plaintiff's common-law negligence and Labor Law § 200 causes of action. By the same token, plaintiff's motion for summary judgment in his favor on his Labor Law § 200 cause of action must be denied because

plaintiff has failed to demonstrate the absence of factual issues regarding whether NY Presbyterian had actual or constructive notice of the ice condition at issue given the frequency of use or lack thereof of the roof (*see Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944-945 [2d Dept 2016]) and as to what constitutes reasonable care under the circumstances in view of the roof-top location of the accident (*see Basso v Miller*, 40 NY2d 233, 240-242 [1976]; *cf. Lesocovich*, 81 NY2d at 985).

Although NY Presbyterian states that it seeks dismissal of New Cingular's cross-claims in its cross-motion papers, it failed to articulate any factual or legal basis entitling it to dismissal of New Cingular's claims in its initial moving papers and only raised arguments specifically addressing New Cingular's claims for the first time in its reply papers. Accordingly, this court denies the portion of NY Presbyterian's cross-motion addressed to New Cingular's cross-claims (*see Martinez v Kingston 541, LLC*, 210 AD3d 556, 557 [1st Dept 2022]; *see also Alvarellos v Tassinari*, 222 AD3d 815, 820 [2d Dept 2023]).

Summary

Based on the foregoing, it is

ORDERED that plaintiff's motion (motion sequence number 8) is denied; and it is further

ORDERED that NY Presbyterian's motion (motion sequence number 10) is granted to the extent that: (1) it is entitled to leave to move for summary judgment; and (2) plaintiff's Labor Law § 241 (6) cause of action is dismissed; and it is further

ORDERED that although New Cingular's motion (motion sequence number 11) is untimely, the court, nonetheless, in searching the record, grants summary judgment *dismissing* plaintiff's Labor Law § 241 (6) cause of action as against it.

This constitutes the decision and order of the court.

ENTER

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