SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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INDEX NO. 154940/2020

MASSIRE TANDIA,

Plaintiff,

MOTION DATE 03/07/2025, 04/25/2025

- v -

MOTION SEQ. NO. 001 002

4 WEST 37TH STREET LLC,THE DRAPER, CCNY CONSTRUCTION INC.,

DECISION + ORDER ON MOTION

Defendants.

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4 WEST 37TH STREET LLC, CCNY CONSTRUCTION INC.

Third-Party
Index No. 596069/2020

Plaintiffs,

-against-

FORTHILL CONSTRUCTION CORP., FKM CONSTRUCTION INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 82

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that the part of plaintiff's motion (MS #1) pursuant to CPLR § 3025(b) for leave to amend his complaint and verified bill of particulars in the form annexed to the moving papers (NYSCEF Doc Nos 44, 45) is granted, as the proposed amendments do not "seek[] to add

a new theory of liability" (*Panasia Estate, Inc. v Broche*, 89 AD3d 498, 498 [1st Dept 2011]) but rather specify the sections of the Industrial Code allegedly violated[1]; and it is therefore

ORDERED that the filing of the amended complaint and bill of particulars on NYSCEF within 10 days will be deemed sufficient service upon the appearing parties; and it is further

ORDERED that the part of plaintiff's motion (MS #1) pursuant to CPLR § 3212 for summary judgment on the issue of defendants'[2] liability under Labor Law § 241(6) is granted because plaintiff made the required prima facie showing and "[t]here is nothing in the record to indicate that the accident happened other than as testified to by plaintiff" (*Ward v Urban Horizons II Hous. Dev. Fund Corp.*, 128 AD3d 434, 435 [1st Dept 2015])[3]; the "materials, [] cut rebar, [] two-by-fours, [and] pieces of plywood [] on the ground" as a result of the carpentry work being performed (NYSCEF Doc No 46, p. 50) was not "integral to the work" but rather

[1] While defendants argue that "[n]othing in the Plaintiff's deposition testimony establishes whether his accident occurred on a 'floor, passageway, hallway, scaffold, platform or other elevated working surface' pursuant to § 23-1.7(d) or a 'working area' pursuant to § 23-1.7(e)(2)" (NYSCEF Doc No 52), plaintiff testified that he was "asked to take the plywood from one side [of the ground floor] to another" and "[t]here were a lot of things . . . on the floor by the walls, [which] provoked [his] fall" (NYSCEF Doc No 46, pp. 42-45 ["I slipped . . . [on] the garbage"]). The area as described by plaintiff qualifies as a "floor" covered by Industrial Code §§ 23-1.7(d) and 23-1.7(e)(2).

[2] For the purposes of this decision/order, "defendants" refers to 4 West 37th Street LLC and CCNY Construction Inc.

[3] Defendants assert that: they have "no records . . . that indicated that the Plaintiff was even at this site, no less fell at the site" (NYSCEF Doc No 52), but the only record they submit to support this assertion, an unsigned daily log from the date of plaintiff's accident with no reference to an accident (NYSCEF Doc No 59), is "inadmissible [because] defendants failed to lay a proper foundation [] as a business record" (*Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 417 [1st Dept 2021]); "[t]here is no ambulance report indicating that an ambulance was called to this site and medical records indicate that the Plaintiff sought treatment at Columbia Presbyterian Hospital, which is located [] near where he lived" and a 30-minute train ride from the work site (NYSCEF Doc No 52), but plaintiff explained in his deposition why he went to a hospital closer to home and did not take an ambulance (NYSCEF Doc No 46, pp. 59, 65-66); Richard Fung, witness for 4 West 37th Street LLC, "testified that he was personally present on the site on the date of the Plaintiff's accident . . . [and] did not recall an incident" (NYSCEF Doc No 52), but plaintiff testified that his accident was witnessed by Soloman Suno and Kabe [last name not specified] (NYSCEF Doc No 46, p. 52), who were never deposed; in the progress photo Fung took on the date of plaintiff's accident, "there was no excessive debris on the ground," but defendants fail to specify when in relation to plaintiff's accident the photo was taken; "Plaintiff's testimony, that his accident occurred around 3:30 pm on October 11, 2017 simply does not make sense because he is not triaged [] until [5]:58 [pm]" (*id.*), but plaintiff testified that when he fell, he "waited at least 30 minutes [for the manager to arrive] but he didn't come" and then had to travel to the hospital (NYSCEF Doc No 46, p. 52-53); contrary to plaintiff's statements "that workers from the site accompanied him to the emergency room, [] the triage document [from the hospital] indicates that [plaintiff] was accompanied by himself" (NYSCEF Doc No 52), but plaintiff merely testified that Solomon and Kabe "took [him] to the hospital," not that they accompanied him to check in (NYSCEF Doc No 46, pp. 53).

"constituted an accumulation of debris from previous work that was left in a [] 'working area' which should have been kept free of debris" (*Lourenco v City of New York*, 228 AD3d 577, 580 [1st Dept 2024]; *Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668, 668 [1st Dept 2019]) and "appropriate preventative measures would not have made it impossible for plaintiff to do his work" (*Zyskowski v Chelsea-Warren Corp.*, 238 AD3d 498, 501 [1st Dept 2025]; *Sinai v Luna Park Hous. Corp.*, 209 AD3d 600, 601 [1st Dept 2022] ["the integral-to-the-work defense[] applies when eliminating the alleged defective condition would be impractical and contrary to the very work at hand and inconsistent with accomplishing a task that was an integral part of the job"] [internal quotation marks omitted]), as evidenced by the fact that these materials were "cleaned up often" during the work day (NYSCEF Doc No 46, p. 50); and while defendants note that plaintiff improperly worked and sought medical treatment under his brother's name, he did not "testif[y] falsely" as to these issues but rather admitted them during his deposition (NYSCEF Doc No 52); and it is further

ORDERED that the unopposed part of defendants' motion (MS #2) pursuant to CPLR § 2001 to correct the filing of their answer (NYSCEF Doc No 11) is granted to the extent that defendants may refile it on NYSCEF and the answer is deemed timely served; and it is further

ORDERED that the part of defendants' motion (MS #2) pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint is:

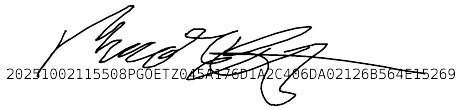
(i) Denied with respect to plaintiff's common law negligence / Labor Law § 200 cause of action because defendants "failed to submit any proof establishing that they lacked constructive notice of the condition" (*Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023] [also noting that "various witnesses' testimony" presented "credibility issues that cannot be properly determined on a summary judgment motion"]; *McKinney v Empire State Dev. Corp.*, 217 AD3d 574 [1st Dept 2023] [claims could not be dismissed where issues of fact remained as to whether defendants had notice of dangerous condition]);

(ii) Granted with respect to plaintiff's Labor Law § 240(1) cause of action because plaintiff's injury is not "attributable to the kind of extraordinary elevation-related risk that the statute was intended to guard against" (*Sihly v New York City Tr. Auth.*, 282 A.D.2d 337, 723 N.Y.S.2d 189 [2001]), and plaintiff does not address this issue in his opposition and therefore the cause of action is deemed abandoned (*Murphy v Schimenti Construction Co., LLC*, 204 AD3d 573, 574 [1st Dept 2022]);

(iii) Denied with respect to plaintiff's Labor Law § 241(6) cause of action, for the reasons stated *supra*;

And it is further

ORDERED that on the court's own motion, plaintiff is directed to show cause before the court in IAS Part 47, at the Supreme Court located at 111 Centre Street, Room 1021, New York NY 10013, on November 13, 2025 at 2:15 p.m., why an order should not be entered dismissing the complaint as against defendant The Draper for failure to timely serve same, or amending the caption to reflect defendants as 4 West 37th Street LLC *d/b/a The Draper* and CCNY Construction Inc.[4]



10/2/2025
DATE

PAUL A. GOETZ, J.S.C.

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

[4] Defendants' response to plaintiff's notice to admit indicates that "on October 11, 2017, defendant 4 West 37th Street LLC was doing business as the Draper" (NYSCEF Doc No 50; *see also*, NYSCEF Doc No 73 [email between counsel implying that defendants' counsel "do[es] not represent The Draper and that The Draper does not exist as a legal entity and is simply the nickname for the hotel being built"]).