At an IAS Term, Part 83 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 25th day of November, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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HUGO HARMEL MONTEZA ROMERO,

Plaintiff,

-against-

4201 MAIN ST LLC,
SUNLIGHT CONSTRUCTION AA, LLC and
THE WITTS CONTRACTING INC,

Defendants.

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4201 MAIN ST LLC and
SUNLIGHT CONSTRUCTION AA LLC,

Third-Party Plaintiffs,

-against-

H&Z BUILDING CONSULTING INC.,
ECOSAFETY CONSULTANTS INC.,
DIVINE SAFETY GROUP INC.,
GARCIA MANAGEMENT GROUP CORP. and
JA CRUZ CONSTRUCTION LLC,

Third-Party Defendants.

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Index No.: 520024/2021

DECISION AND ORDER
(Mot. Seq. Nos. 4-6)

The following e-filed papers read herein:	NYSCEF Doc Nos.
Mot. Seq No. 4	
Notice of Motion/Affirmation in Support/Memorandum of Law/ Statement of Material Facts/Exhibits.....	115 – 134
Affirmation in Opposition to Motion/Response to Statement of Material Facts/Exhibits.....	186 – 187
Reply Affirmation.....	194
Mot. Seq. No. 5	
Notice of Motion/Affirmation in Support/Memorandum of Law/Exhibits.....	136 – 138, 140 – 158
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Mot. Seq. No. 6	
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Affirmation in Opposition.....	188
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Upon the foregoing papers, Defendants 4201 Main St LLC and Sunlight Construction AA, LLC (collectively, "Defendants") move, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff Hugo Harmel Monteza Romero's ("Plaintiff") complaint (Mot. Seq. No. 4). Plaintiff partially opposes Defendants' motion[1] and moves for an order (a) granting partial summary judgment, pursuant to CPLR 3212, on his Labor Law § 241 (6) claim and (b) dismissing Defendants' affirmative defenses alleging Plaintiff's culpable conduct and/or comparative negligence (Mot. Seq. No. 5). Defendants oppose the Plaintiff's motion. Defendants also move for an order (i) pursuant to CPLR 3215, for a default judgment against Third-Party Defendants EcoSafety Consultants Inc. ("EcoSafety"), Garcia Management Group Corp. ("Garcia Management") and JA Cruz Construction LLC ("JACC") (collectively, the "Defaulting Defendants") on the grounds that they failed to answer the Third-Party Complaint and/or otherwise appear in the impleader action and (ii) scheduling an inquest on damages against the Defaulting Defendants (Mot. Seq. No. 6).

This matter involves an accident that occurred on June 4, 2021, at a construction site located at 130-18 Maple Avenue in Flushing, New York (the "Premises"). The Premises is owned

[1] "Plaintiff does not oppose that portion of Defendants' motion seeking dismissal of either the Labor Law § 240(1) claim or that portion of the Labor Law § 200 and common law negligence claim based on Defendants' supervision and control over the means and methods of Plaintiff's work" (NYSCEF Doc No. 186, ¶ 4).

by Defendant 4201 Main St LLC ("4201 Main"). Defendant Sunlight Construction AA, LLC ("Sunlight") was the general contractor for the construction project. Plaintiff, a rebar worker, was employed by JACC. On the date of the accident, Plaintiff testified that he was tasked with cutting iron bars and carrying them to where his coworkers needed them. Immediately prior to the accident, Plaintiff was carrying multiple rods and walked three or four feet before he slipped on mud, tripped over a long wooden form, and fell onto a wooden form on the ground.

In their motion, Defendants argue that Plaintiff's Labor Law § 200 and common law negligence claim must be dismissed because there is no evidence that they created, or had notice of, any defective or dangerous condition. According to Defendants, Plaintiff was aware of the purported defective conditions (i.e., mud, small and larger forms). Specifically, Defendants cite to Plaintiff's deposition wherein he testified that these conditions were in the same spot from the morning he arrived up until his accident and that he was aware of the wet floor and puddles prior to his accident. Thus, Defendants contend that the conditions were readily observable and open and obvious. In addition, Defendants assert that dismissal of Plaintiff's Labor Law § 241 (6) cause of action is warranted because the alleged violations cited by Plaintiff are inapplicable to his claims.[2] Turning first to Industrial Code § 23-1.7 (d),[3] Defendants argue that the wet condition at the Premises is attributed to a rain event the day prior to the accident. In support of their argument that this section does not apply, Defendants cite to their engineering expert Kelly D. Scott's affirmation in which he states that "wet uncoated concrete is not a slippery condition" (NYSCEF Doc No. 134, ¶ 30). According to Defendants, there is no evidence that the accident was caused by their failure to remove or cover a foreign substance. Moreover, Defendants assert that there is no evidence (a) indicating how long the alleged wet concrete existed prior to the accident or (b) establishing that someone knew about it and failed to remove or cover it. Defendants further claim that the area where Plaintiff's accident occurred was not a passageway; instead, it was an active

[2] In his Bill of Particulars, Plaintiff asserted that Defendants violated various Industrial Code sections and OSHA regulations. In opposition to Defendants' motion and in support of his motion for summary judgment on his Section 241 (6) claim, Plaintiff has only addressed Industrial Code Sections 23-1.7 (d), (e)(1) and (e)(2). Therefore, every other code or regulation not addressed is deemed abandoned and will not be discussed (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]).

[3] Industrial Code § 23-1.7 (d), which concerns slipping hazards, provides as follows:

> 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 substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing (12 NYCRR 23-1.7 [d]).

work area. Defendants also assert that Industrial Code § 23-1.7 (e)[4] is inapplicable. With respect to Section 23-1.7 (e) (1), Defendants contend the accident did not occur in a passageway since Plaintiff had room to traverse without needing to walk through the area where there were alleged puddled water, debris and other construction material. Lastly, Defendants aver that Section 23-1.7 (e) (2) does not apply because there is no evidence supporting a trip and fall over dirt or debris and Plaintiff testified that he did not trip or slip on any wooden, concrete or iron pieces.

In opposition, Plaintiff asserts that his Labor Law § 200 and common law negligence claims should not be dismissed. Plaintiff argues that Defendant did not meet its burden in establishing that it did not have constructive notice since it failed to present evidence as to when they last inspected the area prior to the accident. Plaintiff also opposes the portion of Defendant's motion seeking dismissal of Labor Law § 241 (6) and cross-moves for partial summary judgment on this cause of action with respect to Industrial Code Sections 23-1.7 (d), (e) (1) and (e) (2). Regarding Section 23-1.7 (d), Plaintiff contends that muddy water in his "passageway workspace created unsafe footing" (NYSCEF Doc No. 185, ¶ 26). With respect to Defendants' expert Mr. Scott, Plaintiff notes that he did not inspect the subject location or perform any testing on concrete surfaces covered in water and mud. Plaintiff further argues that even if the wet, muddy condition was not a foreign substance, liability would still attach because a safer alternative was available (i.e., having the cleaning crew present throughout the day to clean the existing muddy water). Plaintiff also argues that Section 23-1.7 (e) (1) was violated since the subject area constituted a passageway that was littered with construction material. Moreover, Plaintiff argues that he tripped and fell on a wooden form and that none of JACC's work that day involved the use of wood. Plaintiff also contends that the area where he fell also constituted a "working area" under Section 23-1.7 (e) (2). Plaintiff disputes that there was an alternative path for him to take.

In reply, Defendants maintain that the three Industrial Code sections do not apply. Since wet, uncoated concrete is not a slippery condition, Defendants argue that Section 23-1.7 (d) is inapplicable. Further, Defendants claim that Sections 23-1.7 (e) (1)-(2) are inapplicable since the

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[4] Industrial Code § 23-1.7 (e), addressing tripping and other hazards, states that:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed (12 NYCRR 23-1.7 [e]).

accident happened in an open work area and the "long form" Plaintiff allegedly tripped on was integral to ongoing work. With respect to Plaintiff's Labor Law § 200 and common law negligence claims, Defendants argue that there is no evidence that they had constructive knowledge of the mud or long form. Defendants also argue that these conditions were readily observable.

In his motion, Plaintiff also seeks dismissal of Defendants' affirmative defenses regarding comparative negligence and/or culpable conduct. According to Plaintiff, there is no evidence that Plaintiff was in any way culpable for his incident and resulting injuries. In opposition, Defendants aver that the question of whether Plaintiff was comparatively negligent and/or culpable is for the trier of fact to determine. In addition, Defendants cite to Plaintiff's deposition testimony in which he testified that he was instructed not to start a job until everything was clean and he was aware that the subject floor was not clean when he arrived on the morning of the accident. In reply, Plaintiff maintains that there is no evidence of any comparative or contributory negligence.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (*see Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

The Court will first address the parties' arguments regarding Labor Law § 241 (6). "Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in . . . all areas in

which construction . . . work is being performed" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014], *lv denied* 26 NY3d 905 [2015]). "As a predicate to a section 241 (6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code" (*Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]). "[C]omparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

With respect to Industrial Code §§ 23-1.7 (e) (1) and (2), Plaintiff testified that he "tripped over the long form," and did not trip or slip on any wooden, concrete or iron pieces (Plaintiff tr at 98, lines 12-13; at 104, lines 13-15). Plaintiff further testified that he had seen the forms used as "support where the plywood and the rods go" (*id.* at 56, lines 4-8). Sunlight's former project manager Wusheng Zhou also testified that the form or Titan post is used "for the support of the concrete up on top" (Zhou tr at 97, lines 14-25; at 98, lines 2-5). These transcripts, as well as Mr. Scott's affirmation,[5] establish that the "long form" was an integral part of the construction (*see Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 714 [2d Dept 2020]; *Cody v State of NY*, 82 AD3d 925, 928 [2d Dept 2011]). Defendants met their prima facie burden by demonstrating that the long form upon which Plaintiff alleged he tripped over was an integral part of the construction work being performed (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022] ["[N]either subdivision (1) nor (2) of 12 NYCRR 23-1.7 (e) applies where the object over which the plaintiff trips is an integral part of construction"]). Plaintiff contends that since JACC's work on the day of the accident did not involve wood, "it cannot be said that the wood on which Plaintiff tripped was somehow 'integral' to his work" (NYSCEF Doc No. 186). However, Plaintiff failed to raise an issue of fact by not addressing the form, which is explicitly what Plaintiff testified he tripped over. Thus, Plaintiff's Labor Law § 241 (6) claim is dismissed to the extent it is based on Industrial Code §§ 23-1.7 (e) (1) and (2).[6]

The Court now addresses that portion of Plaintiff's Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-1.7 (d). It is undisputed that it had rained the day before the

[5] Mr. Scott stated that the forms or beams depicted in photographs taken at the accident site "were part of the ongoing shoring assembly work" (NYSCEF Doc No. 134, ¶ 31).

[6] Assuming arguendo that the long form was not integral to the work being performed, Section 23-1.7 (e) (1) still would not apply to the facts of this case because Plaintiff's accident happened in an open work area, rather than in a passageway (*see Freyberg v Adelphi Univ.*, 221 AD3d 658, 659-660 [2d Dept 2023]).

accident and the area where Plaintiff fell was exposed to the elements. There is also no question that the alleged wet, muddy condition was not a "substance naturally result[ing] from the work being performed" (*Kowalik v Lipschutz*, 81 AD3d 782, 784 [2d Dept 2011]). Defendants do not contest that the area was wet or muddy. Instead, Defendants assert that wet uncoated concrete is not a slippery condition. The Court finds Defendants' reliance on their expert's conclusory opinion unpersuasive.[7] Here, Plaintiff has established that the wet, muddy concrete floor was a slippery condition (*see Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022]; *Medina v 1277 Holdings, LLC*, 234 AD3d 839, 843 [2d Dept 2025]). Plaintiff is not "required to demonstrate freedom from comparative fault" (*Ortega v R.C. Diocese of Brooklyn, NY*, 178 AD3d 940, 942 [2d Dept 2019], citing *Rodriguez v City of New York*, 31 NY3d 312, 323, 76 NYS3d 898, 101 NE3d 366 [2018]). Therefore, Plaintiff is entitled to summary judgment on his Labor Law § 241 (6) cause of action to the extent it is based on a violation of Industrial Code § 23-1.7 (d). The comparative fault, if any, of Plaintiff is a defense available to Defendants at trial.

The Court now reviews Plaintiff's Labor Law § 200 and common law negligence claims. "'Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors and their agents to provide workers with a safe place to work'" (*Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020], quoting *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "'Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site and those involving the manner in which the work is performed'" (*Southerton v City of New York*, 203 AD3d 977, 979-98 [2d Dept 2022], quoting *Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). Where a plaintiff alleges that his injuries result from an alleged dangerous premises condition, "an owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence" (*Costa v Sterling Equip., Inc.*, 123 AD3d 649, 650 [2d Dept 2014]). "To meet [their] initial burden on the issue of lack of constructive notice, the defendant[s] must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Gray v Lifetitz*, 83 AD3d 780, 780 [2d Dept 2011]). Moreover, "proof that a dangerous condition is open and obvious does not preclude a finding of liability against a

[7] The Court notes that Mr. Scott did not consider the presence of mud on the concrete.

landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

Here, Defendants' claim that they did not have notice is entirely conclusive. In failing to proffer evidence as to the last time the area was cleaned or inspected, Defendants did not meet their burden establishing entitlement to judgment as a matter of law. Therefore, it is not necessary to consider the sufficiency of Plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Next, the Court will discuss the portion of Plaintiff's motion seeking dismissal of Defendants' affirmative defenses of culpable conduct or comparative negligence. Plaintiff answered "Yes" when asked if the mud was there the entire time on the day of the accident prior to his fall (Plaintiff tr at 117, lines 22-25). He further testified that "everything was wet there when we came in to work" (Plaintiff tr at 62, lines 9-12). Thus, the Court finds that there is a "triable issue of fact as to whether the condition was readily observable, which bears upon the issue of the plaintiff's comparative negligence" (*Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 719 [2d Dept 2020]; *Vigil v City of NY*, 110 AD3d 986, 987 [2d Dept 2013]; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1006 [2d Dept 2009]). Thus, this portion of Plaintiff's motion is denied.

Lastly, the Court considers the propriety of Defendants' motion seeking a default judgment against the Defaulting Defendants. By order of this Court, dated April 17, 2024, the third-party action was severed (NSYCEF Doc No. 108). Nonetheless, Defendants filed the instant motion under the main action "because the third-party index number has not yet been issued" (NYSCEF Doc No. 163, ¶ 16). In opposition, Garcia Management's counsel notes that his office has been waiting for Defendants to obtain a new index number for the severed third-party action (NYSCEF Doc No. 188, ¶ 8). In their reply, Defendants acknowledge that an index number was assigned on November 19, 2024 (NYSCEF Doc No. 195, ¶ 3). Thus, the Court finds that Defendants' motion for a default judgment filed in the underlying action is improper and is therefore, denied.

Accordingly, it is hereby

ORDERED that Defendants' motion (Mot. Seq. No. 4) for summary judgment is granted to the extent that (i) Plaintiff's Labor Law § 240 (1) cause of action is dismissed;[8] (ii) Plaintiff's common law negligence and Labor Law § 200 causes of action are dismissed only to the extent

[8] *See supra* at n 1.

they are premised on a "means and methods" theory;[9] and (iii) Plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent it is premised on a violation of Industrial Code §§ 23-1.7 (e) (1) and (2); and it is further

ORDERED that Plaintiff's motion (Mot. Seq. No. 5) for partial summary judgment as to his Labor Law § 241 (6) claim is granted only to the extent it is based on violations of Industrial Code § 23-1.7 (d); and it is further

ORDERED that the portion of Plaintiff's motion seeking dismissal of Defendants' affirmative defenses alleging Plaintiff's culpable conduct and/or comparative negligence is denied; and it is further

ORDERED that the Defendants' motion (Mot. Seq. No. 6) seeking a default judgment against EcoSafety, Garcia Management and JACC is denied.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[9] *Id.*