SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA-5

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ERROL ALLISON and JUDITH ALLISON,

Plaintiff,

-against-

DEREIMER OWNERS, LLC., CITY WORLD MOTORS LLC., d/b/a CITY WORLD FORD MOTORS

Defendant(s).

Index №. 31654/2020E

Hon. ALISON Y. TUITT

Justice of the Supreme Court

The following papers were read on this motion (Seq No.1) for **SUMMARY JUDGMENT** submitted on March 1, 2024, respectively.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 35-49
Affirmation in Opposition and Exhibits Cross Motion and Exhibits	NYSCEF Doc. # 52-56 NYSCEF # 57-62
Affirmation in Reply	NYSCEF Doc. # 64

Upon the foregoing papers, the defendants DEREIMER OWNERS, LLC ("Dereimers") CITY WORLD MOTORS, LLC d/b/a CITY WORLD FORD ("City") ("collectively Defendants") move pursuant to CPLR 3212 granting summary judgment to Defendants and dismissing Plaintiff's ERROL ALLISON ("Allison") and JUDITH ALLISON (collectively "Plaintiffs") complaint. Plaintiffs oppose and cross move, pursuant to CPLR 3025, for leave to amend the pleadings and bill of particulars to include 12 NYCRR §23-1.7(f) and §23-2.7 (e) as applicable sections of the Industrial Code violated by Defendants in connection with the injured workers claims brought under Labor Law§241(6), as well as previously pled 12 NYCRR §2-1.7 (e)(2). In addition, Plaintiff seeks summary judgment under Labor Law §240(1), §200 and, common law negligence, including the doctrine of *res ipsa loquitor*.

Background

This is an action for personal injuries that occurred on June 20, 2020, when Allison allegedly fell as he was descending exterior stairs leading to the basement in the rear of 3830 Boston Post Road (hereinafter "Premises"). It is alleged that as Allison was walking down the exterior stairs the fifth step from the bottom broke causing him to fall. At the time of the accident Plaintiff was employed by non-party, Coppola Paving and Landscaping Corp., ("Coppola"), as a labor foreman. Coppola is located on the second floor of the building which

is owned by Dereimer. City was a tenant. On the date of the incident Allison was doing work bracing and supporting the underside floors of the Premises.

Plaintiffs' theory of liability rests on common law negligence and violation of Labor Law sections 200, 240(1), and 241 (6). Further, Plaintiff relies on the doctrine *res ipsa loquitur* in support of his negligence claim.

Defendants' argument

City a tenant in the Premises seeks dismissal of the complaint as it is not an Owner, general contractor or statutory agent. Further City contends that it did not have access to the rear of the premises where the accident occurred.

Dereimer avers that Labor Law §240 (1) does not apply in this case as the fall occurred on a permanent staircase and this section applies only to a narrow class of special hazards presenting elevation related risks. Further, this was not the sole means for reaching the basement since the building had an interior and exterior staircase which Allison used to get material to the jobsite. The claim pursuant to Labor Law §241(6) must be[dismissed as Plaintiffs cite violations of industrial codes §23-1.7 (d) [slipping hazards] and §23-1.7 (e) (2) [working area free of dirt and debris], both of which do not apply and were not violated since Allison claims he fell as a result of a step that broke as he was walking down the stairs. Lastly, Labor Law §200 and/or common law negligence must be dismissed since Dereimer did not have actual or constructive notice of any dangerous condition.

In support of the motion, Defendants submit, *inter alia*, the pleadings; Plaintiffs' deposition transcript; the deposition transcript of Dereimer witness Eric Coppola ("Coppola"); the deposition transcript of City witness Christine Bergen; deposition transcript of City witness Mike Russuto; the lease between Dereimer and City.

Allison testified that he had been employed with Coppola as a labor foreman for approximately 25 years (Plaintiff tr. at 15). Coppola was located on the second floor of the Premises and the car dealership City was on the first floor (*id* at 26). On the date of the accident, he was working on supporting the floors of the car dealership. He stated that the day prior he inspected the basement and work area (*id* at 27) and had been to the basement a couple of times on previous occasions. He testified that there were two ways to enter the basement, the building had an interior staircase and exterior staircase (*id* at 29) in which he used both for the job. He stated the reason he used the exterior stairs was to put debris in the trash container located in the back of the building (*id* at 30). He testified that there was a prior incident in 2015 with the exterior stairs involving another worker who did not fall but lost balance when a wood step broke (*id* at 44). The step that broke was third from the bottom. He told Paul Coppola about the incident and told them it was time to change the stairs (*id* at 44,46), however neither the staircase nor the step were not replaced but the step was just supported with a 2x4 (*id* at 47). He was not sure who

did the repair. On the date of the accident, he was using the exterior staircase to bring out debris and did not notice anything wrong with the staircase just that "it looked crappy", "it looked usable" (*id* at 53 line 7,8). He testified that the accident occurred on his way back down the stairs to the basement with two buckets in his right hand. When he landed on the fifth step from the bottom the step broke causing him to fall.

Coppola testified that he and his brother Paul are the owners of Coppola Paving and Landscaping and members of Dereimer LLC (Coppola tr at 23,24). He stated that he was advised that Allison had an accident on the staircase that goes down to a small alleyway that has access to the basement (*id* at 13). He went to inspect the area a few days later when he observed a broken thread on the stairs (*id* at 15). He testified that they had made repairs to the staircase a year or two prior "Errol was in charge of that". (*id* at 15). When asked about inspection of the steps he stated that they were rarely used, if ever (*id* at 49, line 6,7). He was not aware of the condition of the steps *(id* at 49). He testified that Errol was supervising the work being done *(id* at 51).

Coppola's affidavit stated that Allison had made one complaint about the stairs in the rear of the building a few years prior to the accident. Allison made the repair on the stair himself and there were no further complaints regarding the stairs. He stated that the repair was done to a different step. After the repair he never observed anything wrong with the stairs and there was no indication that the stairs were in any danger of cracking.

As an initial matter, in opposition Plaintiffs concede that City did not contract for the construction work at issue nor did it direct or control that work. Plaintiff acknowledges that the accident did not take place where work was being performed, but rather, on the exterior stairs going from the working area in the basement to the container outside. As such, City's motion for summary judgement and dismissal of all claims against them is granted with no opposition by Plaintiffs.

The remainder of the motion and cross motion will be considered together for the purpose of this decision.

Plaintiff's argument

In opposition Plaintiffs incorporate by reference their cross motion seeking to amend the pleadings to identify additional Industrial Code sections violated to support a claim under Labor Law §241 (6), specifically, industrial codes§23-1.7 (f) [Vertical Passage] and §23-2.7 (e) [Protective Railings]. Plaintiffs contend that their cause of action have merit and present no new factual theory or prejudice to Defendants. In terms of §23-2.3 (e), previously pled, Plaintiff contends there are no triable issues of fact as to whether these sections apply since the code broadly discusses conditions that could cause a tripping hazard. Plaintiffs aver that Dereimer violated Labor Law §240 (1) since the stairway qualifies as a safety device and provides a means of access to the container that had been placed on the owner's property located in the rear of the building. Plaintiffs contend that Dereimer violated Labor Law §200 and common principles of negligence since it produced no evidence as to when the

steps were last inspected and acknowledges that it was aware of the dangerous condition over which it had exclusive control.

In their cross motion, Plaintiff's contend that they are entitled to summary judgment under Labor Law §240 (1) since the stairway qualifies as a safety device. Also, Plaintiffs seek summary judgment under Labor Law §241 (6) with respect to the originally plead sections of the Industrial code §23-1.7(e) (1) and §23- 1.7 (e) (2) slipping hazard and accumulation of debris. They aver they are entitled to summary judgment under Labor Law 200 and common law negligence since Dereimer acknowledges that it was aware of a dangerous condition over which it retained exclusive control. Allison had informed Dereimer of the overall defective condition of the staircase prior to the accident and Plaintiff established that Dereimer had no inspection procedure in place. Lastly, Plaintiff claims liability under the theory of *res ipsa loquitor* since the step would not have broken absent negligence, Dereimer wholly owned the property where the accident took place, and the accident was not due to any voluntary action or contribution of Allison.

In support of the opposition and cross motion Plaintiffs submit an affidavit of Errol Allison which states, in pertinent part, that prior to beginning work in the basement he spoke to Eric Coppola to discuss logistics of the work being performed. He stated that due to the Covid pandemic they mutually agreed that it would be best that he accessed the basement using the exterior stairs to avoid contact with workers at City. He stated that using the exterior stairs made sense, insomuch as, the container to deposit the debris was located in the back lot. He affirmed that some years prior to the accident he informed Eric Coppola's brother Paul that one of the exterior steps had broken and that the stairs needed to be replaced since they were old, warped, worn in spots and had no handrails. The step that broke was subsequently repaired by someone other than himself. He stated that he discussed the stair's poor condition with Eric Coppola before the work began in the basement, but they agreed nonetheless that these stairs would be used for the wor. He stated that when the fifth step broke, he lost his balance and attempted to grab onto something, but nothing was available. Lastly, he affirmed that he never saw either Eric or Paul Coppola use the exterior stairs and he never saw anyone from Deriemer inspect the exterior steps.

Applicable Law and Analysis

To be entitled to the drastic remedy of summary judgment, the moving party must make *prima facie* showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corporation*, 18 NY3d 499, 503 [Ct app 2012]. Only when the movant satisfies its prima facie burden will the burden shift to the

opponent "to lay bare his or her proof and demonstrate the existence of triable issue of fact". (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Labor Law §241(6)

"Labor Law §241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers [citations omitted]" (*Giza v New York City School Construction Authority*, 22 AD3d 800, 801 [2 nd Dept 2005]). " In order to support a cause of action pursuant to Labor Law §241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*Biafora v City of New York*, 27 AD3d 506 [2 nd Dept 2006], and which sets forth specific safety standards" *(Giza*, 22 AD3d 800).

In the bill of particulars Plaintiff's allege violation of Industrial Code §23-1.7 (d) [slipping hazards]and §23-1.7 (e) (2), [working area free of dirt and debris]. Defendant established prima facie that these provisions do not apply to the facts of the instant case since the accident was caused when Allison stepped on a faulty step as he was descending the staircase. In opposition, Plaintiff's failed to raise a triable issue of fact that would suggest Plaintiff slipped as a result of a "slippery" condition or that it was caused by debris.

That branch of Plaintiff's motion for summary judgment on Labor Law §241(6) that rests on newly plead Industrial Code provisions is not a true cross motion (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87 [1 st Dept 2013]) however, this failure is not fatal to a section §241 (6) claim and, in the absence of unfair surprise and prejudice, may be rectified by amendment, even where a note of issue has been filed (*Walker v Metro-North Commuter RR.*, 11 AD3d 339,342 [1st Dept 2004]) Plaintiff, in seeking to amend the bill of particulars, asserted a violation of Industrial Codes §23- 1.7 (f), which states: "Vertical Passage. Stairways, ramps, runways shall be provided as the means to access to working levels or below ground except where the nature of the work prevent their installation…" However, in this case, there are at least issues of fact as to whether these permanent exterior stairs used by Plaintiff to access the basement falls within the definition of this section since Allison testified that he used both interior and exterior stairs for this job. Plaintiff's "belated identification of th[is] section entails no new factual allegations, raises no new theories of liability, and results in no prejudice to the Defendant[s] (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]). Thus, Plaintiff's are granted leave to amend the bill of particulars on this point, and summary judgment dismissing the 241(6) claim is denied.

The request for leave to amend as to Industrial Code §23-2.7 (e) entitled "Stairway requirements during the construction of buildings, Protective railings" however does not apply to the facts of this case and is "patently devoid of merit" (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499,499 [1st Dept 2010]) since it sets forth requirements for stairways during the construction of buildings. This is not the case here as Plaintiff testified that

he was working on supporting the ceiling of the building and Plaintiffs do not allege that Allison's accident was the result of an inadequate safety railing on the staircase.

Labor Law §240 (1)

Often called the "scaffold law", Labor Law 240(1) provides that "[a]ll contractors and owners ...shall furnish or erect, or cause to be furnished or erected...scaffolding, hoists, stays, ladders, slings hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises]". Labor Law §240 (1) requires *inter alia* that an owner provide proper protection to a worker employed at a construction site who is exposed to elevation-related risks. Here, Allison fell as he descended the exterior stairway leading to the basement, The stairway upon which he fell was a normal appurtenance to the building and was not designed as a safety device to protect him from elevation-risk; accordingly its use is not a predicate for a cause of action under this section (*Griffin v NY City Transit Auth.*, 16 AD3d 202 [1st Dept 2005]).

Labor Law §200 and /or Common-Law Negligence

In contrast to sections §240 and §241, which apply to construction sites or construction work, Labor Law section §200 mandates that all workplaces be so equipped or operated so as to provide "reasonable and adequate protection" to the persons employed there. Also, in contrast section §200 has been deemed a codification of common law, and as such, liability can be imposed under this section only if the party charged with violating it was negligent. As generally applied, this requirement means that a party cannot be held liable unless it controlled the work being done by plaintiff or knew or should have known of the condition or work practice at issue and had the ability or authority to correct it. Here there is no dispute that Dereimer was the owner of the property and had a general duty to keep the premises in a reasonable safe condition. Therefore, in order to meet its initial burden for summary dismissal of plaintiff's common law and statutory claims of negligence, defendant was required to establish as a matter of law that it neither created the allegedly dangerous condition nor had actual or constructive notice of its existence (*Cappabianca v Sklanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to allow the owner to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Defendants fail to establish that they did not have actual or constructive notice of any present hazardous condition at the time of the accident, as the evidence submitted does not include any specific proof as to when the premises was last visited or inspected prior to the accident (*Smith v Montefiore Med Ctr.*, 192 AD3d 609 [1st Dept 2021], citing *Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014] Here, Coppola testified that he was aware of a prior problem with the exterior stairs and claimed it was repaired by Plaintiff Allison. He testified that the stairs were rarely used and not routinely inspected. Allison testified that

after the prior incident he had reported that the stairs needed to be replaced and the step that had previously broken was only reinforced by someone, not himself. Allison described the stairs on the day of his accident as looking "crappy". Accordingly, there are triable issues of fact as to whether Defendants had notice of a hazardous condition and failed to timely remedy it thereby causing or contributing to the Plaintiff's injuries with respect to the integrity of the exterior stairs before the step broke (*Herrero v 2146 Nostrand Ave. Assoc., LLC* 193 AD3d 421 [1st Dept 2021]). With respect to Plaintiff's cross-motion Plaintiff failed to present sufficient evidence demonstrating no issues of fact exist. Plaintiff's affidavit stating that he discussed the disrepair of the steps with Coppola prior to starting work, and that they agreed this staircase should be used exclusively contradicts his deposition testimony. "While issues of fact and credibility may not be ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavit submitted by plaintiff clearly contradicts his own deposition testimony and can only be considered to have been tailored to avoid consequences of his earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion (*Perez v Bronx Park S. Assocs.*, 285 AD2d 402 [1st Dept 2001]). Any conflict between plaintiff and the documentary evidence merely presents an issue of credibility for resolution at trial (*Leo v St Michael Academy,* 272 AD2d 145,146 [1st Dept 2000]).

Alternatively, Plaintiff's requests judgment on their Labor Law§200 claim under the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is not a discrete cause of action; but rather, it represents the application of circumstantial evidence to permit a trier of fact to draw an inference of negligence solely from the happening of the accident. (*Valdez v Upper Creston, LLC*, 201 AD3d 560, 561 [1st Dept 2022]). *Res ipsa loquitur* applies when a plaintiff established that " (1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff (*Valdez*, 201 AD3d 561). Where a plaintiff's prima facie evidence is so convincing that the inference of negligence arising therefrom is inescapable and unrebutted, summary judgment on liability is proper. (*Valdez*, 201 AD3d 561). Here, as noted, Plaintiffs failed to meet their initial burden establishing prima facie that Defendants created or had notice of the alleged hazardous condition. Plaintiff had used the stairs several times without incident prior to the accident and testified that he did not observe any defect or hazardous condition. Further the event was not in the exclusive control of Dereimer, as Coppola testified Allison was supervising the work.

Accordingly, it is hereby,

ORDERED that Defendant City's motion for summary judgment is GRANTED; and it is further,

ORDERED that Defendant Dereimer's motion for summary judgment under Labor Law 240 (1) and 241 (6) for Industrial Codes§ 23-1.7 (d) and §23-1.7 (e) (2) is GRANTED; and it is further,

ORDERED that Defendant Dereimer's motion for summary judgment under Labor Law 200 and/or Common Law Negligence is DENIED; and it is further,

ORDERED that Plaintiff's cross-motion seeking summary judgment under Labor Law 240(1) is DENIED; and it is further,

ORDERED that Plaintiff's cross-motion for summary judgment motion under 241 (6) for Industrial Codes §23-1.7 (d) and §23-1.7 (e) (2) is DENIED; and it is further,

ORDERED that Plaintiff's cross-motion to amend the pleadings to identify Industrial §23- 1.7 (f) to support a claim under Labor Law 241 (6) is GRANTED; and it is further,

ORDERED that Plaintiff's cross-motion to amend the pleadings to identify Industrial Code §23-2.7 (e) to support a claim under Labor Law 241 (6) is DENIED; and it is further,

ORDERED that Plaintiff's cross-motion for summary judgment under Labor Law 200 and/or common law negligence is DENIED; and it is further,

ORDERED that Plaintiff cross-motion for summary judgment under the doctrine of *res ipsa loquitur* is DENIED; and it is.

ORDERED that the Clerk of the Court shall enter judgment in accordance with the foregoing.

This constitutes the Decision and Order of this Court.

Dated: 4/14/2025

Hon. A. Y. Tuitt
Alison Y. Tuitt, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION.....	☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT