SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 103558/2010
GOREZNY, MAREK
vs.
16 COURT STREET OWNER
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 103558/10
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that the motion by defendants 16 Court Street Owner and SL Realty Corp., s/h/a SL Realty, LLC, pursuant to CPLR 3212, for summary judgment to dismiss the complaint of plaintiff Marek Gorezcny is granted solely to the following extent:

(a) plaintiff's Labor Law §241 (6) claims premised on the violations of the Industrial Code sections 23-1.16, 23-1.18 and 23-1.7 (d), are severed and dismissed; and

(b) plaintiff's Labor Law §200 and common law negligence claims are severed and dismissed.

Defendants' motion is otherwise denied. And it is further

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on his Labor Law §240 (1) claim is granted on the issue of liability. And it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: 10/18/2012

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 35

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GORECZNY, MAREK,

Plaintiff,

-against-

16 COURT STREET OWNER and
SL REALTY, LLC,

Defendants.

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Index No. 103558/2010

DECISION/ORDER
Motions Seq. 001 and 002

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this Labor Law action, defendants 16 Court Street Owner ("16 Court") and SL Realty Corp., s/h/a SL Realty, LLC ("SL Realty") (collectively, "defendants"), move, pursuant to CPLR 3212, to dismiss the complaint of plaintiff Marek Goreczny ("plaintiff"). Plaintiff moves for summary judgment on liability on his Labor Law §240 (1) claim.

Background Facts

On April 1, 2009, at or about 6:30 a.m., plaintiff was injured while working at an elevator modernization project at a commercial building located at 16 Court Street in Brooklyn, New York. At all relevant times, 16 Court was the owner and SL Realty was the manager of the property. Plaintiff was an employee of ThyssenKrupp Elevator ("ThyssenKrupp"). On the day of the incident, he was working with ThyssenKrupp's mechanic Stephen Savastano ("Savastano") on running a communication cable from the elevator shaft ("pit") to the hallway in the basement of the building. Savastano passed the cable from the pit through an opening in the wall above the door frame and directed plaintiff to pull the cable on the other side of the wall, in

[1] Motion sequence 001 and motion sequence 002 are consolidated for joint disposition and decided herein

the hallway. In order to reach the cable, plaintiff used a section of a "stack ladder," which he had found in the pit. The ladder did not have rubber feet. When plaintiff was pulling the cable, the ladder slid out from underneath him, causing him to fall.

Thereafter, plaintiff commenced this action against defendants, alleging violations of Labor Law §§200, 240 (1), 246 (1) and common law negligence.

In support of their motion for summary judgment to dismiss plaintiff's complaint, defendants first argue that plaintiff's Labor Law §240 (1) claim should be dismissed on the ground that plaintiff's actions in improperly using a sectional ladder without rubber feet were the sole proximate cause of his injury. Given plaintiff's 30-year experience of working on elevator modernization projects, plaintiff *should have known* that an A-frame ladder should be used for this type of task and the appropriate A-frame ladders were available at the job site. ThyssenKrupp's project superintendent Alex Menendez ("Menendez") testified at deposition that the proper A-frame ladder was available in a shanty located either on the sixth, seventh or eighth floor (Menendez transcript, p. 67). And in any event, plaintiff testified at his deposition that, while the ladder did not have the rubber feet, it was otherwise in a good condition and free of any obvious defects (plaintiff transcript, exhibit H, p. 51) and he may have previously used the same ladder in the pit area (*id.*, pp. 48-49).

Next, plaintiff's Labor Law §246 (1) claim[2] should likewise be dismissed on the grounds that the Industrial Code sections cited by plaintiff are inapplicable to the facts of this case and plaintiff was the sole proximate cause of his injuries.

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[2] Plaintiff alleged Industrial Code §§ 23-1.7 (Protection for General Hazards); 23-1.16 (Safety belts, harnesses, tail lines and lifelines); 23-1.18 (Sidewalk sheds and barricades) and 23-1.21 (Ladders and ladderways).

As to Labor Law §200 and common law negligence, defendant cannot be held liable because they did not supervise, control or direct plaintiff's work of pulling the cable. Neither did they have control over the work site or actual or constructive notice of any dangerous condition. No complaints were received before the incident. Plaintiff's co-worker Savastano testified that the shiny marble floor, known as "terrazzo," was clean and he did not observe any hazardous conditions that would have caused the ladder to slip out from under plaintiff (Savastano transcript, exhibit L, p. 49).

In opposition and in support of his motion for partial summary judgment, plaintiff argues that defendants should be held absolutely liable under Labor Law §240 (1). Plaintiff was engaged in an enumerated activity under the statute, *i.e.*, the repair or alteration of the building's elevator structures; he was standing on a ladder when the ladder slipped out from under him, causing him to fall; and the ladder did not provide him with adequate protection, the direct result of which he sustained serious injuries.

Also, defendants' sole proximate cause defense is unavailing because plaintiff was not provided with a secure ladder and no proper ladders were available in the area of plaintiff's incident. That some other ladders were available somewhere at the job site, does not mean that adequate safety devices were readily available. Plaintiff testified that, since he could not reach the wire, he went inside the pit and took one of the two sections of the ladder while his co-worker took the other section (plaintiff transcript, pp. 56-57). Savastano testified that other, A-frame ladders, which belonged to the building, were stored in a locked "slop sink closet" room (Savastano transcript, exhibit L, p. 38). He also testified that "[they] had to ask permission from the building to use them [and] couldn't just take them. They were locked up" (*id.*, p. 39). And, if

anywhere, there could have been a nonstackable ladder in the "motor room" [located on the top of the building] (*id.*, p. 40).

Further, the project superintendent Menendez testified that he did not know whether an A-frame ladder was available to plaintiff [at the time of the incident] (Menendez transcript, p. 93). While there might have been an A-frame ladder in the shanty (*id.*, 67), it could have been used by other workers (*id.*, p. 105).

Furthermore, plaintiff did not know where the ladder was, and there is no evidence showing that he was expected to use it and for no good reason chose not to do so. And even if plaintiff took the other section of the ladder, there is no evidence that the other section had rubber feet. Menendez testified that he did not know whether the sectional ladder had rubber cleats (*id.*, at 104).

As to Labor Law §246 (1),[3] plaintiff argues that defendants violated Industrial Code §23-1.21 (b)(3)(iv), which prohibits the use of defective or flawed ladders; section 23-1.21 (b)(4)(ii), which requires firm footing for all ladders; and section 23-1.7 (d) (Slipping hazards). Plaintiff testified that the ladder had no rubber feet and that the "terrazzo" floor was slippery because it was polished and shiny (plaintiff transcript, p. 115; Menendez transcript, pp. 70-71); Also, the building kept trash bins not far from the area where he fell. The slippery terrazzo floor, not covered to provide safe footing for the ladder, contributed to plaintiff's fall.

And finally, defendants should be liable for negligence under Labor Law §200 and common law. The building incident report submitted by defendants, which purportedly shows

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[3] The court notes that plaintiff withdrew his claims based on Industrial Code §§ 23-1.16 and 23-1.18 as inapplicable to the facts of this case (*see* plaintiff's opposition, Souren A. Israelyan, Esq.'s Affirmation, ¶46). Therefore, plaintiff's claims predicated on these sections of the Industrial Code, are dismissed.

that on the morning of the incident the floor in the area of the incident was dry and clean, has no probative value as it is based on hearsay. The building manager Caro Nuzzo ("Nuzzo"), who prepared the report based on Menendez's account, testified that on the day of the incident, she did not go to the basement until 9:30 a.m.

In reply and in opposition to plaintiff's motion, defendants again assert the sole proximate cause defense to plaintiff's Labor Law §§240 (1) and 241 (6) claims, arguing that the proper ladders were available to plaintiff since they were stored on the upper floors of the building in his employer's shanty; there was no defect in the ladder; and there was no hazardous condition on the floor. As to the Labor Law §200 claim, defendants did not supervise, control or direct plaintiff's work of pulling the wire through the wall and defendants did not have notice of any alleged defect with respect to either the floor or the ladder.

In reply, plaintiff argues that since he was not provided with a secure ladder in violation of the statute, his actions could not be the sole proximate cause of his injuries. Further, plaintiff did not know where to find the secure ladder that defendants argue was available. And, there is no evidence that the *other* stackable section of the ladder had rubber feet on it. Plaintiff testified that there were only two sections of the three-section stack ladder in the pit; the other section was the same; and no one knew where the third section was (pp. 48; 56-57). Menendez likewise testified that he did not know where the sectional ladder with the rubber feet was (Menendez transcript, pp. 104-105).

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact" (CPLR 3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at 927; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]). "On a motion for summary judgment, the opposing party is entitled to every favorable inference that can be drawn from the evidence" *(Dawson v Alarcon*, 154 AD2d 320, 546 NYS2d 609 [1st Dept 1989]; *Negri v Stop & Shop*, 65 NY2d 625, 491 NYS2d 151 [1985]).

Labor Law §240 (1) Claim

Labor Law §240 (1)[4] imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In order to prevail on a section 240 (1) claim, the injured worker must show that the violation of the

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[4] Section 240 (1), entitled "Scaffolding and other devices for use of employees," states:

"All contractors and owners and their agents,[. . .] who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

statute was a proximate cause of his injuries (*Ernish v City of New York*, *supra*).

It is well settled that the "failure to secure a ladder to insure that it remains stable and erect while the plaintiff was working on it constitutes a violation of Labor Law § 240 (1) as a matter of law" (*Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 [1st Dept 2004]; *Devlin v Sony Corp. of Am.*, 237 AD2d 201, 655 NYS2d 762 [1st Dept 1997], *citing McNair v Salamon*, 199 AD2d 170, 171 [1st Dept 1993]).

In *McNair v Salamon*, plaintiff, an electrician's helper, was injured when he fell from a ten foot "A" frame ladder while attempting to push a wire "snake" through a conduit pipe. The only witness to the accident was the plaintiff himself. He testified that he fell when the ladder, which was not secured in any way and did not have any rubber shoes or pads on the bottom, simply slipped out from under him. The court found that, because the ladder was not secured in any way and did not have any nonskid devices on its feet, plaintiff was not provided with proper protection in direct violation of Labor Law §240 (1) (*McNair v Salamon*, at 170).

Here, it is undisputed that plaintiff was involved in the building's elevator system alteration at the elevation of at least a third or fourth rung on the ladder. Thus, this type of work falls within the protection of Labor Law §240 (1) (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]). It is also undisputed that the ladder was not equipped either with slip-resistant feet or otherwise secured to ensure its stability. Thus, since the ladder was insufficient to ensure proper protection to plaintiff within the meaning of the statute, a violation by defendants of Labor Law § 240 (1) has been established as a matter of law.

Furthermore, the evidence that the unsecured ladder simply slipped out from underneath him, causing him to fall and sustain injuries, demonstrates that defendants' violation of the

statute was a proximate cause of plaintiff's injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]; *see Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing John v Baharestani*, 281 AD2d 114 [2001]).

In light of the demonstrated statutory violation, defendants' defense of plaintiff's actions as the sole proximate cause of the incident is unavailing. It is well settled that where, as here, "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 853 NYS2d 305 [1st Dept 2008], *citing Blake v Neighborhood House. Servs. of N.Y. City*, 1 NY3d 280; *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 40, 790 NYS2d 74 [2004]).

Furthermore, the "sole proximate cause" defense may be raised in Labor Law §240 (1) action only when the owner or contractor establishes that adequate safety devices were provided, that "plaintiff knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011] *citing Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d at 40, *supra* and *Gallagher v New York Post*, 14 NY3d 83, 88, 896 NYS2d 732, 734 [2010]; *Ramos v Port Authority of New York and New Jersey*, 306 AD2d 147, 761 NYS2d 57 [1st Dept 2003]; *cf. Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771, NYS2d 484 [2003]). A safety device is no "readily available" if the worker does not know where to find it or that he or she was expected to use it (*Gallagher v New York Post*, 14 NY3d 83).

In *Ramos* (*supra*), the court rejected defendants' claim that plaintiff was the sole

proximate cause where defendants could not establish that a scaffold was available *in the area where plaintiff was working*, and held that the evidence that there might have been a scaffold at another location, was insufficient to defeat plaintiff's summary judgment motion.

Likewise in *Auriemma* (*supra*), the court held that, if a worker is expected to obtain a safety device himself, rather than having one provided to him, it should be "only when he knows exactly where a safety device is located, and that there is a practice of obtaining the safety device himself because it is easily done [. . .] The general availability of safety equipment at a work site does not relieve the defendants of liability" (*Auriemma, citing Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]["the mere presence of ladders or safety belts somewhere at the worksite does not establish "proper protection"]).

Here, the court finds that defendants' evidence, indicating that A-frame ladders purportedly more secure for the type of work that plaintiff performed, and *generally available* in the building's shanty either on the sixth, seventh or eighth floor (Menendez transcript, p. 67), is insufficient to defeat plaintiff's summary judgment.

Furthermore, defendants have not asserted, nor is there any evidence in the record, that the plaintiff either knew where a more secure ladder was located or that it was his habit to get one for himself (*Auriemma* ; *Gallager, supra)*. Defendants' assertion that based on his 30-year work experience in connection with elevator modernization projects, plaintiff *should have known* that the A-frame ladder should be used for this type of task, is of no moment. The record shows that no secure ladders were available to plaintiff in or around the elevator pit where he was working and he did not know where he could find a proper ladder. In this regard, ThyssenKrup's mechanic Savastano testified as follows:

Q.: Were there ladders of any sort located anywhere else on the project site?
A.: Not in the basement, no.
Q.: Anywhere in the building on the project si[t]e?
A.: They have different ladders, six-foot regular foldable ladders. But they were the building property. They weren't our ladders.
Q.: Where were they located?
A.: In a closet. There's like a slop sink closet, you know. It wasn't accessible.

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A.: We had to ask permission from the building to use them, yes. We couldn't just take them. They were locked up.

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Q.: At the time that you and [plaintiff] were running the cable, where were these other non-stackable ladders?
A.: They were not down in the pit or in the basement area.
Q.: Where were they, if anywhere?
A.: If anywhere, they could have been in the motor room.
(Savastano transcript, pp. 38-40).

Likewise, that plaintiff "may have [previously] used" the same ladder in a different area, is immaterial to the issue of defendants' liability (*Singh v Hanover Estates*, 276 AD2d 394, 714 NYS2d 713 [1st Dept 2000][that Labor Law plaintiff had been using the scaffold for a month prior to the accident without indication of any problems was insufficient to raise an issue of fact as to whether the accident was due solely to plaintiff's fault]; *Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381, 644 NYS2d 722 [1st Dept 1996]). Thus, no triable issue is raised as to whether plaintiff's use of the ladder was the sole proximate cause of his injury *(Kapovic v 450 Lexington Venture*, 280 AD2d 321, 720 NYS2d 470 [1st Dept 2001].

Accordingly, since defendants failed to provide plaintiff with an adequate ladder as mandated by the statute, and such failure was a proximate cause of plaintiff's injury, defendants are absolutely liable under Labor Law §240 (1) and plaintiff is entitled to summary judgment on his Labor Law §240 (1) claim.

In light of the above, the court denies the portion of defendants' summary judgment

motion premised on this section of the statute.

Labor Law §246 (1)

Labor Law § 241(6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009]). In order to recover, a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross*, 81 NY2d at 501-502; *Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]). Such violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long*, 55 NY2d at 160).

Here, plaintiff alleges violations of sections 23-1.21 (b)(3)(iv) and 23-1.21 (b)(4)(ii) and 23-1.7 (d).

23-1.21 (b)(3)(iv)

Section 23-1.21 (b)(3)(iv), which relates to the maintenance and conditions of ladders, provides that "[a] ladder should not be used [. . .] [i]f it has any flaw or defect of material that may cause ladder failure."

Defendants failed to establish *prima facie* of their entitlement to summary judgment dismissing plaintiff's 241(6) claim based on this section. Here, the evidence in the record that the

ladder which plaintiff used had no rubber feet raises an issue of fact as to whether the ladder was defective (*see Soodin v. Fragakis*, 91 AD3d 535, 937 NYS2d 187 [1st Dept 2012][the evidence that plaintiff was supplied with an old shaky ladder that *lacked rubber footings* and was placed on a slippery polyurethane-coated polished floor, and that the ladder toppled over, causing him to fall, established noncompliance, *inter alia*, with Industrial Code §§23–1.21(b)(3)(iv) and (4) (ii)]; *De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 [1st Dept 2001][reversing the dismissal of plaintiff's 241 (6) claim premised on the Industrial Code section 23-1.21 (b)(3)(iv) where the ladder used by plaintiff, among other things, lacked rubber feet]). Furthermore, an issue of fact exists as to whether the absence of rubber footings on the ladder was a contributing cause of plaintiff's fall.

Therefore, the portion of defendants' motion to dismiss plaintiff's claims predicated on this section of the Code, is denied.

23-1.21 (b)(4)(ii)

Section 23-1.21 (b)(4), entitled "Installation and use," provides in subsection (ii) that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." This section has been held to be sufficiently specific to qualify as a predicate for liability under Labor Law 241 (6) (*see Hart v Turner Const. Co.*, 30 AD3d 213, 818 NYS2d 499 [1st Dept 2006]; *Jamison v County of Onondaga*, 17 AD3d 1142, 796 NYS2d 761 [4th Dept 2005]).

Defendants have not met their burden of summary judgment on this ground. Defendants neither cite any authority nor offer any arguments in support of the dismissal of plaintiff's claim premised on the violation of this section. Defendants' contention that plaintiff was the cause of

his accident, because he misused the ladder by using the wrong ladder section, without the rubber feet, at most, raises an issue of plaintiff's comparative fault, which may be addressed at trial *(Li v Chun Kien Realty Corp.*, 2012 WL 1240997 (Trial Order)[Sup Ct New York County 2012]).

The court further finds that, in light of the evidence that the ladder, which lacked rubber feet (pp. 51- 52), was placed on a polished "terrazzo" floor (plaintiff transcript, p. 115; Menendez transcript, pp. 70-71), factual issues exist as to the manner of the installation and use of the subject ladder, *i.e.*, whether defendants violated the secure footing requirement of this provision, and if so, whether such violation was a proximate cause of plaintiff's injury. Thus, the dismissal of plaintiff's 241 (6) claim premised on the violation of this section, is unwarranted.

23-1.7 (d)

The court finds that section 23-1.7 (d) (Slipping hazards) is inapplicable to the facts of this case as matter of law. This section provides that

> "[e]mployers 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."
>
> (Industrial Code §23-1.7 (d)). (Emphasis added).

Here, there is no evidence that any foreign slippery substance was present on the floor (*cf. Rizzuto v L.A. Wenger Contr. Co.. Inc.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998][diesel fuel, sprayed on the floor of the depot, created a slippery condition in violation of several State Industrial Code provisions, including 12 NYCRR 23–1.7(d)]). Indeed, plaintiff testified that the floor was clean and he observed no slippery substance at the foot of the ladder (plaintiff transcript, exhibit J, p. 115).

It is noted that plaintiff's allegations that the floor was unsafe because it was made of terrazzo, which is known to be [inherently] slippery, ignores a well-settled principle that the mere fact that a smooth floor may be slippery, in and of itself, does not create a basis for liability (*see Sarmiento v C&E Associates*, 40 AD3d 524, 525 [1st Dept 2007][that marble stairs were inherently slippery was not in itself a basis for liability]; *Waiters v Northern Trust Co. of New York*, 29 AD3d 325, 816 NYS2d 18 [1st Dept 2006] [absent proof of the reason for plaintiff's fall other than the "inherently slippery" condition of the floor, no cause of action for negligence can properly be maintained], *citing Kruimer v Natl. Cleaning Contr., Inc.*, 256 AD2d 1, 680 NYS2d 511 [1998]; *Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 806 NYS2d 326 [4th Dept 2005][the mere fact that a smooth wood floor may be slippery does not support a cause of action to recover damages for negligence"]).

It is also noted that plaintiff's accident occurred not because of any failure to remove or cover a foreign substance (*Dugandzic v New York City School Const. Auth.*, 174 Misc 2d 702, 665 NYS2d 831 [Sup. Ct., Kings County 1997]) but because the ladder was allegedly defective due to the absence of rubber footings.

Thus, plaintiff's Labor Law §241 (6) claim premised on the violation of this 23-1.7 (d), is dismissed.

Labor Law 200 and Common Law Negligence

Labor Law §200[5] codifies the common-law duty imposed on an owner or general

[5] Labor Law §200 states, in pertinent part: "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

contractor to provide construction site workers with a safe work site *(Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010]; *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000]). "To support a finding of liability under Labor Law § 200, [. . .], a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hospitals Ctr.*, 63 AD3d 587, 883 NYS2d 8 [1st Dept 2009]; *Makarius v Port Authority of New York and New Jersey,* 76 AD3d 805, 907 NYS2d 658 [1st Dept 2010] ("Under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability can also arise when the accident is caused by a dangerous condition at the work site, that was either created by the owner or general contractor or about which they had prior notice"); *see also Urban v No. 5 Times Square Dev, LLC*, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]).

Defendants demonstrate, through testimonial evidence, that they did not supervise, control or direct plaintiff's work of pulling the cable in the basement as plaintiff testified that he was working under the guidance and instruction of ThyssenKrup mechanic Savastano. Defendants further demonstrate that they had no actual or constructive notice of any alleged defect with respect to either the floor or the ladder. Plaintiff's co-worker Savastano's testified that the shiny marble floor [terrazzo] was clean and he did not observe any hazardous conditions that would have caused the ladder to slip out from under the plaintiff (Savastano transcript, exhibit L, p. 49). No complaints were made before the alleged accident about any alleged dangerous conditions, and all witnesses, including plaintiff, testified that there was no slippery

substance on the floor at the time or immediately after the incident.

In opposition, plaintiff failed to raise an issue of fact. Even assuming that Nuzzo and Menenendez, who collectively created the building incident report, observed the area only post-incident, the observations of plaintiff and his co-worker Savastano that on the morning of the incident, no hazardous conditions of the floor were observed (Savastano transcript, exhibit L, p. 49), are sufficient to establish the lack of notice. Such lack of notice is sufficient to relieve defendants from liability under Labor Law §200 and for common law negligence. As such, the portion of defendants' motion for summary judgment dismissing these claims is granted and said claims are severed and dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants 16 Court Street Owner and SL Realty Corp., s/h/a SL Realty, LLC, pursuant to CPLR 3212, for summary judgment to dismiss the complaint of plaintiff Marek Gorezcny is granted solely to the following extent:

(a) plaintiff's Labor Law §241 (6) claims premised on the violations of the Industrial Code sections 23-1.16, 23-1.18 and 23-1.7 (d), are severed and dismissed; and

(b) plaintiff's Labor Law §200 and common law negligence claims are severed and dismissed.

Defendants' motion is otherwise denied. And it is further

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ORDERED that counsel for defendants shall serve a copy of this order with notice of

entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: October 18, 2012

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD