NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 05

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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BORNER,EDWARD

Index №. **0309359/2008**

-against-

Hon. **ALISON Y. TUITT** ,

FORDHAM UNIVERSITY,INC.

Justice.

----------X

The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **March 21 2013** and duly submitted as No. ____ on the Motion Calendar of 6/3/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/17/2013

Hon. _____
ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

EDWARD BORNER,

Plaintiff,

-against-

FORDHAM UNIVERSITY, INC., JEFFREY M. BROWN ASSOCIATES, INC., SASAKI ARCHITECTS, LANDSCAPE ARCHITECTS AND P.E., P.C., SASAKI ASSOCIATES, INC. and MUESER RUTLEDGE CONSULTING ENGINEERS,

Defendants.

INDEX NUMBER: **309359/2008**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3

Read on this Defendants' Motion for Summary Judgment

On Calendar of **4/15/13**

Notice of Motion-Exhibits, Affirmation	1
Affirmation in Partial Opposition and Exhibits	2
Defendant's Reply Memorandum	3

Upon the foregoing papers, defendants' motion for summary judgment is granted in part and denied in part for the reasons set forth herein. Additionally, to the extent that plaintiff does not oppose the dismissal of his Labor Law §240 claim, that cause of action is dismissed.

The within action involves personal injuries allegedly sustained by plaintiff on December 18, 2007 in the course of his employment with Aquifer Drilling & Testing, Inc. (hereinafter "ADT") as a core driller when he slipped and fell on ice or another "slick, slippery, frozen, dangerous and/or hazardous conditions". Plaintiff has alleged claims of negligence and Labor Law §200 and 241(6) against defendants.

Plaintiff voluntarily discontinued his claims against defendant Jeffrey M. Brown Associates, Inc. Defendants, Sasaki Architects, Landscape Architects and P.E., P.C, Sasaki Associates, Inc. (collectively "Sasaki") and Mueser Rutledge Consulting Engineers (hereinafter "MRCE move for summary judgment seeking dismissal of all of plaintiff's causes of action.

Defendant Sasaki was retained by defendant Fordham University, Inc. (hereinafter "Fordham") to perform architectural services in connection with the design and construction of new residence halls to be built on the Fordham campus in the Bronx, New York. Sasaki hired defendant MRCE to provide geotechnical engineering services for the project, which included the preparation of a soils study and geotechnical investigation report including foundation design recommendations. In order to perform this investigation, MRCE retained ADT to perform the necessary core drilling. Plaintiff was employed by ADT and was assigned to serve as one of the core drillers for the project. MRCE's investigation and the drilling to performed by ADT took place in a former parking lot on the Fordham campus where the residence halls were to be built. At the time of plaintiff's accident, the former parking lot where the work was being performed was empty. This investigation took place during the design phase of the project and defendants claim there was no construction, demolition or excavation taking place. Plaintiff contradicts this and refers to the work as a "construction project".

Plaintiff alleges that December 18, 2007, the date of the accident, was his first day on the job. Plaintiff arrived at the rear parking lot of Fordham early and parked his car by the rig that was already in place where he would be working. He observed the icy conditions, and he poured sand on the ice to create traction. He testified that the entire parking lot was a "sheet of ice". Emily Rubinstein, an inspector for MRCE was already there when he arrived. He discussed the plans of the project with her, as well as the icy condition on the ground. He asked whether someone from Fordham would be salting it or removing the ice "because we could barely drive on the parking lot, let alone stand at the time." Plaintiff testified that Ms. Rubinstein told him that she was not sure but that she would talk to someone at Fordham. In the course of that conversation, plaintiff learned that the hole where his rig was located needed to be done urgently so they would not be able to relocate it to another site as they would normally, when there were "hazardous" conditions at the worksite. Plaintiff further stated that "[t]he maintenance crew was not on my schedule, I decided to make the work area a little bit safer for us and spread sand around the ridge where we were talking." Plaintiff alleges that he slipped and fell

while spreading the sand and testified that the accident happened as "I was in the process of spreading well sand on the ice and fell. Slipped and fell and I didn't have my arms, I was holding the sand and fell back and hit my head on the ice."

Plaintiff testified that after falling, he continued working throughout the day and at the end of the day, he spoke with Steve Wolf and reported the accident. Plaintiff claims that Mr. Wolf "just change[d] the subject right away because that was normal. Normal operating procedure for ADT was, if you got hurt, if you weren't carried away in an ambulance you weren't really hurt." Plaintiff filed a Worker's Compensation claim and several weeks later he purportedly received call from Mr. Wolf who was concerned that the Worker's Compensation documents noted that he had been notified of the accident or that the accident had been reported. Plaintiff further claims that Mr. Wolf asked him to change the form to indicate that Mr. Wolf was not informed of the accident. Plaintiff then purportedly reminded him that they had spoken on the day of the accident. Plaintiff claims he was then fired from his job. Defendants contradict this and state that plaintiff did not file an accident or incident report until months after the fact when he suffered neck pain. They also claim that plaintiff did not notify his employer of the incident until nearly six months after as evidenced by a June 18, 2008 letter from Steve Wolf, ADT's Vice President, to the New York State Insurance Fund.

Joseph Scaltro, P.E., was the senior project manager for Fordham's dormitory project at the time of plaintiff's accident. He submits an affidavit in support of the instant motion wherein he states that as senior project manager, he represented Fordham's interests to the contractors and subcontractors working on the project. Mr. Scaltro further states that in December 2007, the project was in the design phase and no general contractor had been retained to perform any work. At this time, the project's design team was in the process of analyzing the soil so that the foundation of the buildings could be designed. The core drilling was taking place in a former parking lot on Fordham's campus. Mr. Scaltro claims that the parking lot was not an active walkway or active parking lot during the core drilling phase and that Fordham did not maintain this area at this time. Mr. Scaltro further states that if there were any icy or unsafe conditions at the site of the core drilling, it was the responsibility of the core drillers employed by ADT to remedy the condition or otherwise notify him that they needed assistance to remedy the condition.

Prior to submitting his affidavit, Mr. Scaltro testified at a deposition and he testified as follows:

Q. My question is, if they arrived at the site and were unable to perform their work because of an ice condition, what was your understanding as a senior project manager on behalf of Fordham as to what the construction workers or core drillers were supposed to do?

A. If the site was unworkable, they would have to let us know and we would have adjusted to accommodate their work schedule. Whether it was - if there was a massive snowstorm, we might have waited. If there was a massive snowstorm that needed shoveling, I might have gotten the place cleared for them.

When asked who was responsible for safety conditions at the worksite, such as the accumulations of ice, snow or debris, he replied

A. If there was a situation like that, I would have evaluated who would be responsible...

Q. Well, within that fenced off area, if Mueser Rutledge didn't call you and there was work going on, who was responsible for that site? Was it Mueser Rutledge?

A. I would say it's Fordham University site.

Emily Rubinstein appeared for a deposition and testified that she left her work with MRCE in June 2008 and she did not remember any of the details of her work with the firm or the happenings of the day of the accident. In a report that she created on the day of the accident, Ms. Rubinstein noted that the temperature was 27 degrees Fahrenheit and documented "icy ground". She described the nature of the core drilling that was to be performed at the site as follows:

So, the driller drives five feet and then at five feet he drives a split spoon sample two feet, hopefully and then he pulls the split spoon sample up and you scrape the soil that comes out of it into a jar. You classify the soil while you are scraping it into a jar and then he closed the spoon and he is drilling another five feet and you do this again.

Ms. Rubinstein testified that her supervisor at MRCE, David, directed her and the drillers in their activities. David told the drillers which hole to drill next and where to go. "So, it would be David's job to highlight or cross out the holes we did and it could also be his job to direct me and the drillers as to what holes we should do next." She further testified that the field engineers of MRCE would tell the drillers which hole they were going to drill.

Defendant MRCE submits an affidavit from its senior partner, Alfred H. Bland, who states that he was the partner in charge of supervision of MRCE's work on the project for the design of new residence halls at Fordham. He states that MRCE provides geotechnical, foundation, waterfront and marine engineering services. MRCE does not provide any general contracting or construction services. Mr. Bland further states that, pursuant to a written agreement, MRCE was retained by Sasaki to provide geotechnical engineering services with the project and as a courtesy to Fordham, MRCE engaged ADT, pursuant to a written agreement, to perform the necessary core drilling to obtain the borings for MRCE's investigation. Mr. Bland states that MRCE was not in charge of ADT's means and methods of drilling, exercised no control or supervisory authority over ADT's employees, had no involvement with ADT's work on the site and had no responsibility to ensure ADT employees had a safe workplace. Mr. Bland further states that the soil study and geotechnical investigation was being conducted in a former parking lot located at the Fordham campus. At the time of their investigation, which included the core drilling performed by ADT, no construction, excavation or demolition activities were taking place at the project site. Mr. Bland states that the investigation took place during the design phase of the project. Lastly, Mr. Bland states that the determination of whether weather or site conditions made it unsafe, impractical or impossible for ADT employees to perform their work rested with the ADT employees who bore the sole responsibility for determining whether drilling would occur on any given day.

Pursuant to the agreement between MRCE and Sasaki, the scope of MRCE's services included reviewing all data, preparing a location plan and technical requirements for the borings, coordinating commencement of the borings with the undersity and the driller, and providing inspection of the borings, providing necessary office oversight during the course of the boring program. The agreement also states: "We have been told that the parking lot is controlled by the University and used for overflow events, so access to the borings will not be obstructed by parked cars."

Sumner Friske Crowell an architect and principal with Sasaki submits an affidavit wherein he states that plaintiff's accident took place during the "design phase" of the project where MRCE was in the process of arranging for a soli analysis. The contract between Sasaki and Fordham sets forth Sasaki's role in the phase of the project as follows: "The Architect shall furnish the services of geotechnical engineers when such services are necessary to test borings, test pits, determinations of soil bearing values, percolation tests, ground

corrosion and restivity tests. The contract further provides that "[t]he Architect shall not have control or charge of and shall not be responsible for the construction means, methods, techniques, sequences or procedures of for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, subcontractors, or any other person performing the work...". Mr. Crowell further states that Sasaki was not scheduled to be, and was not, on site on the date of plaintiff's accident; Sasaki was not notified, and had no reason to be notified, of any icy conditions on the site on the date of the accident; and, Sasaki was not in charge of ADT's means and methods of drilling, exercised no control or supervisory authority over ADT's employees, had no involvement with ADT's work on the site, and had no responsibility to ensure ADT employees had a safe workplace.

Steven Wolf, submits an affidavit stating that he is the Vice President/Operations Manager for ADT and has been since 2002. As Vice President and Operations Manager, Mr Wolf is fully familiar with ADT's policies and practices. He confirms that on December 18, plaintiff was employed by ADT and, on the date of the accident, he was assigned to work as a core driller at a project located at Fordham. Mr. Wolf states that ADT employees, such as plaintiff, are responsible for making sure that their work place is safe and they are responsible for clearing and/or mitigating snowy conditions that impede their work. Mitigating icy conditions includes sanding or salting the ice to provide traction. If there was an icy condition, plaintiff was responsible for clearing and/or mitigating the condition and making sure it was safe to work. Furthermore, if an ADT employee deemed his worksite to be in a dangerous, unsafe or unworkable condition, he would typically be notified. He was not notified of any dangerous or icy condition on the date of the accident. Mr. Wolf further states that typically, he would be immediately notified if an employee was injured and it is ADT policy to fill out an accident report. Mr. Wolf denied that plaintiff advised him of an accident on the date he alleges to have been injured. Mr. Wolf states that he was not notified of the alleged accident until months after. Plaintiff did not file an accident report with ADT following the accident.

Defendants further argue that plaintiff's Labor Law §241(6) claim must also be dismissed because there was no construction, demolition or excavation activities occurring at the time of plaintiff's accident. Plaintiff was drilling an empty parking lot and was not performing any services in connection with a building or structure. Defendants further argue that, pursuant to §241(9), design defendants are specifically excluded from liability under §241(6) when they did not exercise control over other's work. Defendant MRCE

argues that it exercised no control over ADT employees and defendant Sasaki argues that it was not even on the site yet. Defendants further contend that plaintiff's claim that the Industrial Code was violated fails as a matter of law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos , 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8. N.Y.2d 8 (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e. with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Defendants argue that plaintiff's common law negligence and Labor Law §200 claims must be dismissed because defendants did not violate any duty running from them to plaintiff. Defendants argue that both claims impose a duty only when an owner or general contractor had notice of the alleged dangerous condition and is in control of the condition. If the danger can be readily ascertained by the senses, there is no duty. Here, MRCE argues that it had no control over the core drillers.

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner and/or general contractor to maintain a safe place to work. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (1998). Liability may arise out of the means and methods used to perform the work or from a defective condition on the property. See, Chowdhury v. Rodriguez, 867 N.Y.S.2d 123 (2d Dept. 2008).

Liability under the statute is therefore governed by common-law negligence principles. Plaintiff's §200 claim are properly dismissed on proof that the owner was not responsible for supervision, controlling and directing plaintiff, or the means and methods by which he performs his work. Carty v. Port Authority of New York and New Jersey, 821 N.Y.S.2d 178 (1st Dept. 2006)(An owner's responsibility for an injury at a worksite, under Labor Law § 200 and common law, requires a showing that it had "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition". Plaintiff produced no evidence that defendant was responsible for supervising, controlling and directing YTP's employees, or the means and methods by which such employees were to perform their work. Moreover, there is no indication that defendant ever received any complaints relating to lighting or other conditions in the tunnel. Mere "monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200". Absent any evidence that defendant created or had prior notice of allegedly defective conditions, the causes of action under § 200 and for common-law negligence were properly dismissed)(Citations omitted). The protections afforded a worker under Labor Law § 200, codifying the common law duty of an owner or contractor to provide a safe place to work, are not limited to construction work and apply to all work place. Paradise v. Lehrer, McGovern & Bovis, Inc., 700 N.Y.S.2d 25 (1st Dept. 1999). "Because the Labor Law § 200 and common-law negligence claims are based on a dangerous condition on the site, not on the methods or materials used in the work, the only issue is whether defendants [Construction Manager and City] had notice of the condition, not whether it exercised supervisory control over the manner of performance of plaintiff's work." Raffa v. City of New York, 955 N.Y.S.2d 9 (1st Dept. 2012); See also Minorczyk v. Dormitory Auth. of the State of N.Y., 904 N.Y.S.2d 383 (1st Dept. 2010).

Plaintiff's Labor Law §200 claims must be against Sasaki must dismissed. It is well settled that design professionals are not liable for injuries sustained to construction site workers unless the design professional commits and affirmative act of negligence or liability is imposed by clear contractual provisions. Jaroszewicz v. Facilities Dev. Corp., 495 N.Y.S2d 498 (3d Dept. 1985)(Architects were not liable under common-law negligence theory of liability for death of maintenance mechanic, who was electrocuted while troubleshooting electrical problem in parking lot lighting system of recently constructed building, where architects contracted to provide supervision and inspection at job site to ensure compliance with contract specifications, that contractual obligation was owed to and for the full benefit of project owner, architects had

neither duty nor right to control manner in which construction work was performed nor was there any proof that the architects engaged in any act of malfeasance which caused or contributed to accident); Davis v. Lenox Scholl, 541 N.Y.S2d 814 (1st Dept. 1989)(In the absence of any contractual right to supervise and control the construction work and site safety, the architect, cannot be held liable in negligence for plaintiff's injuries. Before a statutory duty is imposed upon a party to provide a safe workplace, it must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition...". Only obtaining the authority to supervise and control" does an architect have a nondelegable duty as an agent under sections 240 and 241 of the Labor Law. Nor can the architect be held liable for common law negligence since there is no evidence of active negligence on his part. In such circumstances, he is not responsible for plaintiff's injuries)(Citations omitted).

Here, Sasaki did not have any liability to plaintiff because it did not perform any affirmative act of negligence and their respective contracts do not impose liability for injuries sustained at the work site. Sasaki was not even yet on the grounds or in contact with plaintiff at the time of the accident. Sasaki did not exercise any control over the alleged icy conditions and could not have any notice of conditions on the site as it was not yet at the site. Additionally, the contract between Sasaki and Fordham specifically excluded Sasaki from exercising control over the construction site providing that Sasaki: "shall not have control or charge of and shall not be responsible for the construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, subcontractors, or any other person performing the work."

With MRCE, there is a question of fact as to whether it supervised or exercised control over plaintiff's work. The evidence shows that the decision on whether it was safe for plaintiff to perform his work was up to the employee. Ms. Rubinstein testified that the driller made the decision whether or not to work in certain weather conditions. Mr. Brand states that MRCE was not in charge of ADT's means and methods of drilling, exercised no control or supervisory authority over ADT's employees, had no involvement with ADT's work on the site and had no responsibility to ensure ADT employees had a safe workplace. Mr. Bland also states that the sole responsibility of whether to drill rested with the employee himself. However, the testimony of Ms. Rubinstein, MRCE's previous employee who testified she was a field engineer, that her supervisor directed her and the drillers in their activities at the side and that David told the drillers which hole to drill next

and where to go creates an issue of fact as to whether MRCE supervised or exercised control over plaintiff's work at the site.

With respect to Fordham, there are questions of fact regarding notice of the allegedly dangerous condition and whether it exercised control over plaintiff's work. In order to recover for common law negligence, plaintiff must demonstrate that defendant had actual or constructive notice of a dangerous condition. It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

Plaintiff and Ms. Rubinstein both testified that the condition of the parking lot was icy. As an owner, Fordham had control over the site. The parking lot was used by Fordham for overflow parking for events. Mr. Scaltro, an agent of Fordham and senior project manager for the project, testified if there were any icy or unsafe conditions at the site of the core drilling, it was the responsibility of the core drillers employed by ADT to remedy the condition or otherwise notify him that they needed assistance to remedy the condition. Plaintiff testified that he reported the condition to Ms. Rubinstein and the evidence shows that she documented it in a report. A property owner may be held liable for a snow or ice condition where it had actual notice, or in the exercise of due care, should have had notice of the condition, and had a reasonably sufficient time after the end of the snowfall or temperature fluctuation to remedy the situation. Pepito v. City of New York, 692 N.Y.S.2d 691); DeVivo v. Sparago, 731 N.Y.S.2d 501 (2d Dept. 2001). On a motion for summary judgment, defendants have the burden of establishing that the ice formed so close in time to the accident that they could not reasonably have been expected to notice and remedy the condition. Stalker ex rel. Stalker v. Crestview Cadillac Corp., 726 N.Y.S.2d 533 (4th Dept. 2001). Here, defendant Fordham has failed to make such a showing since the meteorological data shows that the temperature had been freezing since 8:00 p.m. the night before.

Furthermore, defendant Fordham's argument that the condition was open and obvious does not negate defendant's responsibility but is an issue of comparative negligence. The First Department has consistently held that the presence of an open and obvious dangerous condition does not negate defendant's responsibility to keep the premises reasonably safe. See Mizell v. Bright Services, Inc., 832 N.Y.S.2d 14 (1st Dept. 2007)("Even a hazardous condition that is open and obvious does not abate the duty to maintain the premises in a reasonably safe condition. Should the jury conclude that an unreasonably dangerous condition existed, the facts that the condition was readily observable are factors to be considered by the jury in determining the issue of comparative fault."); Gaffney v. Port Authority of New York and New Jersey, 753 N.Y.S.2d 808 (1st Dept. 2003)(Even if the alleged dangerous condition of the ramp was readily observable, such facts go to the issue of comparative negligence and will not negate its duty to keep the premises reasonably safe); Sanchez v. Lehrer McGovern Bovis, Inc., 756 N.Y.S.2d 44 (1st Dept. 2003) ("Assuming the groove was readily observable, such fact would not negate defendants' liability for failing to keep the premises reasonably safe but rather be a factor to be considered as part of comparative negligence").

Labor Law §241(6) concerns reasonable and adequate protection and safety through the worksite. Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to comply with the regulations promulgated by the Commissioner of the Department of Labor that mandate compliance with concrete specifications in the Industrial Code. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993). In order to plead a violation of Labor Law §241(6), plaintiff must allege a specific violation of the New York State Industrial Code. Liability under §241(6) is non-delegable and an owner or general contractor may be held liable notwithstanding their lack of direction and control over the work being performed. The owner and general contractor are equally liable for an injury due to the failure of an agent or subcontractor to use reasonable care even if the owner did not control or supervise the area or the work being done; and even if the owner and general contractor did not know or could not know of any danger to the plaintiff. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (1998). "Thus, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault." Id.

The Labor Law §241(6) claims against defendant Sasaki must be dismissed. Labor Law §241(9)

provides that "[n]o liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers... architects... who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers, architects or landscape architects arising under the common law or any other provision of law." Sasaki and MRCE are both design professionals. However, as stated previously, there is a question of fact regarding MRCE's control over the job site.

Plaintiff Labor Law §241(6) claims against MRCE and Fordham must also be dismissed. Plaintiff alleges that defendants violated the certain provisions of the Industrial Code, however, none of the provisions apply to the facts of this case. Section 23-1.7(d) concerns slipping hazards and 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." Courts have repeatedly excluded open areas, such as parking lots, from this provision's ambit. Talbot v. Jetview Properties, LLC, 857 N.Y.S.2d 411, 412 (4th Dept. 2008)(Defendant's parking lot was not a passageway or a floor within the meaning of §23-1.7(d)); Pozzaro v. City of New York, 834 N.Y.S2d 298 (2d Dept. 2007)(Open, ground level of the work site where worker fell did not constitute a passageway, walkway, or other elevated working surface contemplated by Industrial Code provision requiring removal of ice, snow, water, grease, and any other foreign substance which could cause slippery footing); Roberts v. Worth Construction, Inc., 802 N.Y.S.2d 177, 180 (2d Dept. 2005)(The dirt roadway was located in an open area at ground level and, therefore, did not constitute a passageway, walkway, "or other elevated working surface" contemplated by the regulation)(Citations omitted); Morra v. White, 714 N.Y.S.2d 510 (2d Dept. 2000)(Regulations governing protection from slipping and tripping hazards in construction, demolition and excavation operations did not apply to case in which pedestrian slipped in an open area of the construction site, and not within a defined walkway or passageway).

Here, plaintiff alleges that he slipped in the parking lot which does not constitute a floor, passageway or walkway as contemplated in §23-1.7(d) and, therefore, that claim dismissed. As pointed out by defendants, this case is similar to Gaisor v. Gregory Madison Ave., LLC, 786 N.Y.S.2d 158 (1st Dept. 2004) where the First Department held that "plaintiff's §241(6) claim based upon an alleged violation of Industrial

Code §23–1.7(d), which requires removal of snow and ice so as to provide safe footing, was properly dismissed since the snow on which plaintiff slipped was the very condition he was charged with removing."

Plaintiff also claims that defendants violated §23-1.7(e)(1) which concerns tripping hazards provides that "[a]ll 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." Section 23-1.7(e)(2) regarding working areas provides that "[t]he 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."

These provision are also inapplicable herein as plaintiff claims that he slipped, not tripped on the ice in the parking lot. Plaintiff has not made any allegations regarding tripping, or accumulations of dirt or debris. Moreover, slipping on snow or ice is not covered under §23-1.7. See, Cook v. Orchard Park Estates, 902 N.Y.S.2d 674, 678 (3d Dept. 2010)(dismissing a claim because as "the evidence establishes that plaintiff fell when he slipped on snow covered plastic, 12 NYCRR §23-1.7(e) which relates to tripping hazards, is not applicable here."); Bale v. Pyron, 684 N.Y.S.2d 393, 394 (4th Dept. 1998)(Construction worker who slipped and fell on icy patch of ground on his way to construction site could not recover under safe place to work statute's provisions governing pathways and obstructions, where icy spot where worker fell was not on defined walkway, passageway or path, and area through which worker walked was not obstructed by dirt or debris)

Plaintiff claims that defendants also violated §23-1.8 (c)(2) concerns protective apparel and provides that "[e]very person required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes." This provision is simply inapplicable here as plaintiff was not working in any of those conditions.

Accordingly, for the reasons stated herein, defendants' motion is granted to the extent that the Labor Law §200 and common law negligence causes of action are dismissed against defendant Sasaki, and denied as to defendants MRCE and Fordham. Defendants' branch of the motion that seeks dismissal of plaintiff's Labor Law §241(6) cause of action is granted as to all defendants.

This constitutes the decision and Order of this Court.

Dated: 10/17/2013

Hon. Alison Y. Tuitt