[* 1]

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: Salvatore Scarpulla Justice

PART 19

Index Number : 102184/2010
CASALINI, MICHAEL
vs
ALEXANDER WOLF & SON
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 & and cross motions are determined in accordance with the accompanying decision/order.

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





Dated: 3/18/13

_____, J.S.C.

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 19

----------X

MICHAEL CASALINI and GAIL CASALINI,

Plaintiffs,

-against-

ALEXANDER WOLF & SON a/k/a A.W.&S. CONSTRUCTION CO., INC., MANHATTAN MALL EAT, LLC, STRAWBERRY STORES, INC., VNO 100 WEST 33RD STREET, LLC, VORNADO REALTY TRUST and VORNADO SHENANDOAH HOLDINGS, LLC,

Defendants.

----------X

Index No.: 102184/10

**DECISION AND ORDER**

MANHATTAN MALL EAT, LLC, STRAWBERRY STORES, INC., VNO 100 WEST 33RD STREET, LLC, VORNADO REALTY TRUST and VORNADO SHENANDOAH HOLDINGS, LLC,

Third-Party Plaintiffs,

-against-

FLORIN PAINTING, INC.,

Third-Party Defendant.

----------X

Third-Party Index No.: 590573/10





ALEXANDER WOLF & SON a Division of A.W.& S. CONSTRUCTION CO. s/h/a ALEXANDER WOLF & SON a/k/a A.W.&S. CONSTRUCTION CO., INC.,

Second Third-Party Plaintiff,

-against-

FLORIN PAINTING, INC.,

Second Third-Party Index No.: 590224/11

Second Third-Party Defendant.

----------X

For Plaintiffs:
Silbowitz, Garafola, Silbowitz,
Schwatz & Frederick, LLP
25 West 43rd Street, Suite 711
New York, NY 10036

For Defendant Alexander Wolf & Son:
Barry, McTiernan & Moore
2 Rector Street
New York, NY 10006

For Third-Party Plaintifffs:
Wilson, Elser, Moskowitz,
Edelman & Dicker LLP
150 East 42nd Street
New York, NY 10017

For Third-Party Defendant Florin Painting, Inc.:
Jones Hirsch Connors Miller & Bull P.C.
One Battery Park Plaza, 28th Floor
New York, NY 10004

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, third-party/second third-party defendant Florin Painting, Inc. ("Florin") moves, on behalf of defendants/third-party plaintiffs Manhattan Mall Eat, LLC ("Manhattan Mall"), Strawberry Stores, Inc. ("Strawberry"), VNO 100 West 33rd Street ("VNO"), Vornado Realty Trust ("Vornado Realty") and Vornado Shenandoah Holdings, LLC ("Vornado Shenandoah") (collectively "the ownership defendants"), for summary judgment dismissing plaintiffs Michael Casalini ("Casalini") and Gail Casalini's third and fourth causes of action predicated upon alleged violations of Labor Law § 241 (6) against the ownership defendants; defendant/second third-party plaintiff Alexander Wolf & Son a/k/a A.W. S. Construction Co., Inc. ("Wolf") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim as against it; and plaintiffs cross-move, pursuant to CPLR 2221, for an order granting them leave to reargue that part of the order of the court, dated July 12, 2012, which denied VNO and Strawberry summary judgment on common-law indemnification as against Wolf.

On November 21, 2008, while working on a renovation project at a Strawberry store located at the Manhattan Mall, 100 West 33rd Street, New York, New York, Casalini slipped and fell on debris. At the time of the accident, VNO owned the premises where the accident took place, and Strawberry was its tenant. Casalini was employed by Florin, a subcontractor performing work on the project pursuant to an agreement with Wolf, the project's general contractor.

Casalini testified that, at the time of the accident, he and his co-worker, Vincent Bartelomucci ("Bartelomucci"), were hanging wallpaper on the second floor of the premises. Casalini stated that he received all of his instructions as to how to perform his job duties as a paper hanger from his Florin boss. Casalini did not receive any instruction from the general contractor on the project.

Casalini explained that his paper hanging job required the use of a five-foot-tall A-frame ladder. Before setting up the ladder, Bartelomucci used his foot to kick a small amount of dust and paper away from the area where the work was to be performed. After hanging paper for about 15 minutes, Casalini descended the ladder. Upon stepping off the ladder and taking about three steps back from the ladder in order to view his work, Casalini slipped and fell when he stepped in a four-foot-long by two-foot-wide pile of wet debris. Specifically, Casalini testified, as follows:

> Up on the ladder I was hanging the tops of the wall covering. I stepped off of the ladder, took three steps, tried to turn around. My foot slipped on a pile of debris. I went flying forward, smashed my head against the bucket of water that was filled with the tileman's sand that was in it.

Casalini described the pile of debris that he slipped on as consisting of trash in the form of soda cans, coffee cups, a pizza box, sheetrock, a small pipe and some wiring. At the time that the ladder was set up, approximately 15 minutes before the time of the accident, Casalini did not observe the subject pile of debris in the accident area. In addition, Casalini never made any complaints to anyone about the presence of debris in the area of the accident.

Casalini also testified that, at the time of the accident, there were tile tradesmen working in the accident area. In addition, various other workers were eating their breakfast in the area. Casalini noted that it was common practice for the various trades to throw their garbage onto the floor.

Bartolomucci witnessed the accident. He testified that he and Casalini used a five-foot A-frame ladder to perform their paper hanging work, which he carried to the work location and set up. It was also Bartolomucci's responsibility to clean the work area by kicking away any dirt and debris, in order to prevent it from getting on the wall and causing the paper to pimple. After Bartolomucci performed this prep work, Casalini was to hang the top of the wall covering, and he was to hang the bottom.

Bartolomucci confirmed Casalini's version of the accident by testifying that Casalini "took about four steps back and then he just slid." On the date of the accident, Bartolomucci observed a number of tradesmen at the premises. He stated that it was common for the workmen to eat their lunch and then throw their lunch trash on the floor

for the laborers to sweep up into a big pile for removal. However, sometimes, the trades were asked to clean up their own debris.

Kevin Walter ("Walter"), Wolf's project manager, testified that he maintained a supervisory role over the various subcontractors at the work site. Specifically, he was responsible for ensuring that the necessary materials were ordered and delivered on time, and for checking on the progress of the work. Walter testified that Wolf's supervisor was in charge of coordinating the trades, making sure that there was sufficient labor on hand at the job site and removing debris. Wolf hired union laborers to transport debris from the work sites to the loading docks. After debris was removed from a site, an immediate inspection of the subject area would be conducted. Walter explained that debris removal was immediate in that the debris "wouldn't stay there," stressing that "[c]leanup was constant" throughout the day. Walter asserted that there was never a time that the laborers swept up debris from a work site into a pile and then just left it there.

Immediately following his accident, Casalini told his medical provider at St. Vincent's Hospital in Manhattan that his accident was caused as a result of him falling while stepping off a ladder. In the paragraph of the hospital record entitled "HISTORY OF PRESENT ILLNESS," physician's assistant, Zach Goodman, recorded that Casalini was injured "when coming down a ladder, [he] lost his footing on the last step and turned suddenly and fell to his right side."

**The Court's Order of July 12, 2012**

In motion sequence 001, the ownership defendants had moved, pursuant to CPLR 3212, for summary judgment, among other things, on Strawberry and VNO's cross claims against Wolf for common-law indemnity, including all costs and attorney's fees. In that motion, VNO and Strawberry argued that they were entitled to common-law indemnification from Wolf, because VNO and Strawberry did not supervise or control the work at the premises, and because Wolf was responsible for clearing the debris at the premises.

In its order of July 12, 2012, the court held that VNO and Strawberry failed to make the required showing entitling them to common-law indemnity against Wolf. The court stated, as follows:

> "Though Alexander Wolf may have been responsible for removing debris from the work site, VNO and Strawberry Stores have failed to show that Alexander Wolf was negligent in failing to remove the debris that allegedly caused [plaintiff's] accident. [Plaintiff] testified that the debris was not there fifteen minutes before the accident. Further, there is no evidence in the record that Alexander Wolf had notice of, or created, the pile of debris [citations omitted]. Thus, VNO's and Strawberry Store's motion is denied insofar as it seeks summary judgment on the common law indemnification claim against Alexander Wolf."

In a footnote, the court also noted that "[p]laintiff's hospital records, which state that he fell off the ladder, contradict [his] testimony and create an issue of fact as to the cause of his injuries" (*id.*).

**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 eliminate any material issues of fact from the case'." *Santiago v. Filstein*, 35 A.D.3d 184, 185-186 (1st Dept 2006), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dept 2006); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dept 2002).

**Plaintiffs' Labor Law § 241(6) Claim Against The Ownership Defendants and Wolf**

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502 (1993). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Buckley v. Columbia Grammar & Preparatory,* 44 A.D.3d 263 (1st Dept. 2007).

Although the bill of particulars lists multiple violations of the Industrial Code, with the exception of Industrial Code sections 23-1.7(d), 23-1.7(e)(1) and (2) and 23-2.1(b), plaintiffs do not address these Industrial Code violations in their opposition papers, and thus, they are deemed abandoned. *See Genovese v. Gambino*, 309 A.D.2d 832, 833 (2nd Dept 2003)(where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned); *Musillo v. Marist Coll.*, 306 A.D.2d 782, 784 n (3rd Dept 2003). As such, the ownership defendants and Wolf are entitled to summary judgment dismissing those parts of the Labor Law § 241(6) claim which are predicated on abandoned Industrial Code provisions.

As to the three remaining provisions, Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. 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."

Industrial Code 12 NYCRR 23-1.7(d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241(6). *See Farina v. Plaza Constr. Co.*, 238 A.D.2d 158 (1st Dept. 1997). The ownership defendants and Wolf are not entitled to summary judgment dismissing that part of Casalinis' Labor Law § 241(6) cause of action predicated on an alleged violation of Industrial Code 12 NYCRR 23-

1.7(d). Here, Casalini testified multiple times during his depositions that his injuries were caused because he slipped on a foreign substance, i.e., debris, which was present on the floor where he was working at the time of his accident.

Likewise, the ownership defendants and Wolf are not entitled to summary judgment dismissing that part of plaintiffs' Labor Law § 241(6) cause of action predicated on alleged violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2). 12 NYCRR 23-1.7 (e) (1) 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," and 12 NYCRR 23-1.7 (e) (2) requires that floors and other work areas be kept free from the accumulation of dirt and debris, and from scattered tools and materials and sharp projections. The ownership defendants and Wolf's argument that 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2) are inapplicable because Casalini slipped, rather than tripped, is without merit. *See Collins v Switzer Constr. Group, Inc.*, 69 A.D.3d 407 (1st Dept. 2010); *Cohen v. New York City Indus. Dev. Agency*, 30 Misc. 3d 1235(A)(Sup. Ct. N.Y. Co. 2011).

Industrial Code 12 NYCRR 23-2.1(b), which addresses "disposal of debris," is not sufficiently specific to support a Labor Law § 241(6) claim. *See Quinlan v. City of New York*, 293 A.D.2d 262, 262 (1st Dept 2002); *Mendoza v. Marche Libre Assoc.*, 256 A.D.2d 133, 133 (1st Dept 1998). Thus, the ownership defendants and Wolf are entitled to

dismissal of that part of plaintiffs' Labor Law § 241 (6) claim predicated upon an alleged violation of this Rule.

**Plaintiffs' Cross Motion For An Order Granting Leave To Reargue**

Plaintiffs cross-move, pursuant to CPLR 2221, for an order granting them leave to reargue that part of the court's order, dated July 12, 2012, which denied common-law indemnification as against defendant/second third-party plaintiff Wolf and in favor of defendants/third-party plaintiffs VNO and Strawberry.[1] Plaintiffs argue that the court's factual findings on the issue of Wolf's negligence are contrary to the evidence in this case.

Pursuant to CPLR 2221(d), motions for reargument are addressed to the sound discretion of the court which decided the prior motion, and may be granted upon a showing that the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision. *See Carrillo v. PM Realty Group*, 16 A.D.3d 611, 611 (2d Dept 2005). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented. *See Pryor v. Commonwealth Land Tit. Ins. Co.*, 17 A.D.3d 434, 436 (2nd Dept.

[1]It should be noted that, while in plaintiffs' reply to Wolf's affirmation in opposition to their cross motion to reargue, plaintiffs state that "[i]t is clear from the totality of the deposition testimony, that Wolf committed common law negligence and violated Sections 200 and 241 (6) of the Labor Law and that such was a proximate cause of Casalini's accident and resultant injuries," plaintiffs only cross-moved for an order granting them leave to reargue that part of the order of the court which denied common-law indemnification as against Wolf and in favor of VNO and Strawberry.

2005). New questions that were not previously advanced may not be raised on a motion to reargue. *See Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 258 (1st Dept 2004).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'." *Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 684-685 (2d Dept 2005), *quoting Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 (1st Dept 1999).

"It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault." *Chapel v. Mitchell*, 84 N.Y.2d 345, 347 (1994). As "owner[s] without direction, control, or other supervisory authority over the work site at which plaintiff was injured," here, VNO and Strawberry's liability was purely vicarious. *Tapia v. 126 First Ave., LLC,* 282 A.D.2d 220, 220 (1st Dept 2001); *Parris v. Shared Equities Co.*, 281 A.D.2d 174, 175 (1st Dept 2001). Thus, these defendants are entitled to full common-law indemnification from an actively negligent contractor.

In their cross motion to reargue that part of the court's decision denying common-law indemnification as against Wolf to VNO and Strawberry, plaintiffs argue that Wolf, as general contractor, was the only defendant who could have been actively negligent,

because it, and not any of the ownership defendants, had complete control and supervision over the work being performed at the premises.

However, a review of the deposition testimony in this case reveals that Wolf did not, in fact, have complete supervision and control over the work being performed at the premises. Not only did Casalini testify that his work was solely directed by his Florin boss, Bartolomucci also testified that sometimes the tradesmen at the work site were asked to clean up their own debris.

In addition, plaintiffs contend that, as Wolf's laborers were in a constant state of debris removal, which entailed sweeping debris into piles, Wolf's laborers must have created and/or had notice of the pile of debris that allegedly caused the accident, and, thus, Wolf was actively negligent. However, as also noted by the court in its prior order, Casalini testified that the debris was not present at the accident location a mere 15 minutes before the accident, and there is no evidence in the record that Wolf had notice of the alleged condition. The Court of Appeals has long held that "[t]o 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 permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Moreover, testimony that the Wolf laborers swept debris into piles before removing them raises no more than a general awareness that sometimes piles of debris existed at the work site, which is insufficient to establish constructive notice of the

specific condition that caused the accident. *See Mack v. New York Yankees Partnership*, 69 A.D.3d 542, 542 (1st Dept 2010) (plaintiff's assertion that water accumulated on the escalators each time it rained raised no more than a general awareness that the escalators became wet during inclement weather, insufficient to establish constructive notice as to the specific condition that caused the plaintiff's accident); *Mitchell v. New York Univ.*, 12 A.D.3d 200, 201 (1st Dept 2004).

Further, as neither party has pointed to evidence that the alleged debris condition was an ongoing problem in the specific area where the accident occurred, a recurring dangerous condition has not been established. *See Lance v. Den-Lyn Realty Corp.*, 84 A.D.3d 470, 470 (1st Dept 2011)(recurring dangerous condition must occur in area of the accident to give rise to the inference of constructive notice that the condition existed at the time of the accident).

Finally, as also noted by the court in its order of July 12, 2012, not only has it not been established that negligence on the part of Wolf caused the accident, but also, in light of the initial medical history of Casalini taken immediately following the accident, wherein Casalini advised the hospital that the accident occurred "when coming down a ladder, [plaintiff] lost his footing on the last step then turned suddenly and fell ... ," a question of fact exists as to the actual cause of the accident.

Thus, as plaintiffs have not established that the court misapprehended the law or the facts in its order of July 12, 2012, wherein it denied common-law indemnification as against Wolf to VNO and Strawberry, plaintiffs' motion for leave to reargue is denied.

In accordance with the foregoing, it is hereby

ORDERED that third-party/second third-party defendant Florin Painting, Inc.'s motion, pursuant to CPLR 3212, on behalf of defendants/third-party plaintiffs Manhattan Mall Eat, LLC, Strawberry Stores, Inc., VNO 100 West 33rd Street, Vornado Realty Trust and Vornado Shenandoah Holdings, LLC for summary judgment dismissing plaintiffs Michael Casalini and Gail Casalini's third and fourth causes of action against them, predicated upon alleged violations of Labor Law § 241 (6), is granted, with the exception of that part of the Labor Law § 241(6) claim predicated on alleged violations of Industrial Code 23-1.7(d), 23-1.7(e)(1) and 23-1.7(e)(2); and it is further

ORDERED that defendant/second third-party plaintiff Alexander Wolf & Son a/k/a A.W. S. Construction Co., Inc.'s cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim against it, is granted, with the exception of that part of the Labor Law § 241(6) claim predicated on alleged violations of Industrial Code 23-1.7(d), 23-1.7(e)(1) and 23-1.7(e)(2); and it is further

ORDERED that plaintiffs' cross motion, pursuant to CPLR 2221, for an order granting them leave to reargue that part of the order of the court, dated July 12, 2012,

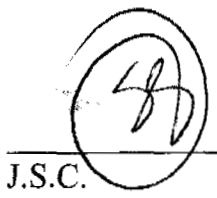
which denied common-law indemnification as against Wolf to VNO and Strawberry, is denied, and it is further

ORDERED that the remainder of the action is severed and shall continue.

This constitutes the decision and order of this Court.

Dated: New York, New York
March 16 2013

ENTER:



J.S.C.