SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE **PART** 12
Justice

Index Number : 102642/2009
COUGHLIN, CHRISTOPHER
vs.
590 MADISON AVENUE LLC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 102642/09
MOTION DATE
MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for S/J

Notice of Motion/Order to Show Cause — Affidavits — Exhibits **No(s).** 1
Answering Affidavits — Exhibits **No(s).** 2
Replying Affidavits **No(s).** 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/29/13

BARBARA JAFFE, 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 : IAS PART 12

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CHRISTOPHER COUGHLIN and KATHLEEN COUGHLIN,

Plaintiffs,

- against -

590 MADISON AVENUE, LLC and SHAWMUT WOODWORKING & SUPPLY INC. d/b/a SHAWMUT DESIGN & CONSTRUCTION,

Defendants.

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SHAWMUT WOODWORKING & SUPPLY INC. d/b/a/ SHAWMUT DESIGN & CONSTRUCTION,

Third-Party Plaintiffs,

- against -

TITAN CONTRACTING GROUP and H.L. ELECTRIC, INC.,

Third-Party Defendants.

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Index No. 102642/09

Mot. seq. nos. 003, 004

DECISION AND ORDER

Third-Party Index No. 590262/10

BARBARA JAFFE, J.:

For plaintiffs:	**For 590/Shawmut:**	**For Titan:**
Daniel J. Hansen, Esq.	Kevin S. Locke, Esq.	Cristen R. Sommers, Esq.
767 Third Ave., 24th Fl.	Nicoletti Gonson *et al.*	Lester Schwab et al.
New York, NY 10017	555 Fifth Ave., 8th Fl.	120 Broadway
212-697-3701	New York, NY 10017	New York, NY 10271
	212-730-7750	212-964-6611

By notice of motion, defendant 590 Madison Avenue, LLC (590) and defendant/third-party plaintiff Shawmut Woodworking & Supply Inc. d/b/a Shawmut Design & Construction (Shawmut) (movants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose and, by notice of cross motion, move pursuant to CPLR 3212 for an

order granting them judgment on their Labor Law 241(b) claim. Movants opposes.

By notice of motion, third-party defendant Titan Contracting Group (Titan) moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint. Shawmut opposes.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

On December 2, 2008, plaintiff was performing electrical demolition work on behalf of his employer, H.L. Electric, Inc. (H.L.) on the 42nd floor at 590 Madison Avenue in Manhattan (premises). 590 owned the premises and Shawmut was the general contractor. (NYSCEF 16).

That day, plaintiff set up a ladder and stood on it while removing from the ceiling piping, cabling, and conduit, which he threw to the ground below. His partner on the job was working with him, and other trades, such as carpenters, plumbers, and HVAC workers, were there performing demolition work, some within 15 feet of the ladder. When plaintiff set up the ladder, he observed no debris in the immediate area, apart from a pile of debris, including glass, two to three feet away from the ladder. (NYSCEF 17).

Plaintiff remained on the ladder for approximately 10 minutes before he descended from it. Without looking at the ground before stepping off, his foot slipped on debris, including insulation paper, screws, and broken glass. He did not fall to the ground. There were no other workers around the ladder before he fell. He did not see the debris before he slipped on it, and had not been working with that type of material while he was on the ladder. (NYSCEF 17).

According to Shawmut's records, on the date of plaintiff's accident, only three subcontractors were at the site, Titan, H.L., and Acoustic & Drywall (Acoustic). Titan performed

overhead demolition and clean-up the night before the accident, but was not present at the site during the day. Acoustic, a drywall subcontractor, performed layout and column mock-up work during the day. H.L. employees removed existing electrical wiring. (NYSCEF 17).

II. MOTION BY 590 and SHAWMUT

Movants deny that plaintiff's Labor Lab 240(1) claim is viable absent any connection between his injury and an elevation-related or gravity-related risk, that plaintiff alleges violations of the Industrial Code sufficient to support his claim under Labor Law 241(6), that he can recover thereon where he slipped rather than tripped, or that plaintiff has a claim against them for a violation of Labor Law 200 or common law negligence as they neither supervised nor controlled his work, and had no notice of the debris on which he allegedly slipped. (NYSCEF 15).

Plaintiff narrows his Labor Law 241(6) claim to violations of Industrial Code sections 23-1.7(d) and 23-1.7(e), and asserts that movants violated them by permitting the floor around the ladder to be littered with debris. He also asserts that is irrelevant whether he observed the debris before he fell as notice is not required. (NYSCEF 27, 30).

A. Labor Law 240(1)

As plaintiff submits no opposition to this portion of the motion, the cause of action is dismissed. In any event, it has no merit. (*See Lopez v City of New York Tr. Auth.*, 21 AD3d 259 [1st Dept 2005] [where plaintiff slipped on debris around bottom of ladder after having descended ladder, injury did not result from elevation-related risk]).

B. Labor Law 241(6) claim

A claim advanced pursuant to Labor Law 241(6) may be based on a specific violation of the Industrial Code. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495 [1993]). Pursuant to

Industrial Code 23-1.7(d),

> [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.

Construction debris does not constitute a "foreign substance" under to this section. (*D'Acunti v New York School Constr. Auth.*, 300 AD2d 107 [1st Dept 2002] [accumulations of dirt and debris did not constitute slippery condition]; *Nankervis v Long Is. Univ.*, 78 AD3d 799 [2d Dept 2010] [same]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009] [same]; *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619 [2d Dept 2003] [demolition debris not foreign substance]).

Pursuant to section 23-1.7(e)(2) of the Industrial Code,

> [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.

When the debris which causes an accident is an integral part of the work being performed, Industrial Section 23-17(e)(2) is inapplicable. (*Appelbaum v 100 Church*, 6 AD3d 310 [1st Dept 2004]; *Sharrow v Dick Corp.*, 233 AD2d 858 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997]).

In *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407 (1st Dept 2010), the plaintiff-electrician was injured when he stepped from a ladder and slipped on debris around it. While the defendant argued that the debris was created by the plaintiff and, as such, was an integral part of the work he was performing, the Appellate Division, First Department, held that the plaintiff's deposition testimony that there were other trades working at the same time and that the debris

differed from the electrical materials he had been using, raised triable issues as to whether the plaintiff created the debris.

Here, as in *Collins*, plaintiff's testimony raises triable issues as to whether the materials constituted an integral part of the construction work that was being performed at the time of his accident. (*See Rodriguez v DRLD Dev., Corp.*, 2013 WL 3984594, 2013 NY Slip Op 05548 [1st Dept] [factual issues found as to whether cable upon which plaintiff tripped was inherent part of construction or "debris"]; *Quinn v Whitehall Props., II, LLC*, 69 AD3d 599 [2d Dept 2010] [as plaintiff testified that floor of work area was covered with debris and scattered materials and he had to clear area in order to place ladder, and when he stepped from ladder, he tripped over debris, triable issues raised as to whether materials which caused fall were integral to work being performed or mere debris]; *compare Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465 [1st Dept 2013] [industrial code provision did not apply as pipe and pipe fittings over which plaintiff fell were not debris but rather consistent with work being performed in room]; *Cooper v Sonwil Distrib. Ctr.*, 15 AD3d 878 [4th Dept 2005] [plaintiff tripped over demolition debris created by him and his coworkers which was integral part of work being performed], *with Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201 [1st Dept 2008] [debris accumulated as result of demolition not integral part of work performed by plaintiff electrician at time of accident]; *Owen v Schulmann Constr. Corp.*, 26 AD3d 362 [2d Dept 2006] [plumber was injured when he tripped on electrical debris; debris was not integral part of work being performed as accident occurred after hours when electrical work for day had been completed]; *Singh v Young Manor, Inc.*, 23 AD3d 249 [1st Dept 2005] [as debris accumulated for several days, no merit to defendant's contention that debris must have been integral part of plaintiff's work in removing wood

paneling]; *Maza v Univ. Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004] [materials not integral to plaintiff's work as bricklayer and while negligence on plaintiff's part may have required apportionment, it did not absolve defendants of own liability]).

C. Labor Law 200 and common law negligence

Pursuant to Labor Law 200 and under common law negligence, a contractor is not liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it had the authority to supervise or control that work. (*Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], *lv denied* 96 NY2d 705 [2001]).

Where it is alleged that a dangerous condition caused the employee's injury, an owner or contractor may be held liable if it created the condition or had actual or constructive notice of it. (*Cappabianca v Skanska Usa Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). A defendant is charged with constructive notice when the dangerous condition is visible, apparent, and exists for a sufficient length of time before an accident to permit the defendant to discover and remedy it. (*Lopez v Dagan*, 98 AD3d 436 [1st Dept 2012]).

Movants rely on plaintiff's deposition testimony to argue that they had no reasonable actual or constructive notice of the debris before plaintiff's accident, nor did they supervise or control his work. Plaintiff asserts only that movants failed to prove, *prima facie*, that they had no notice of the debris, and offer no evidence as to when they last inspected the work area before plaintiff's accident.

As plaintiff testified that the debris on which he was slipped was neither present nor

visible beneath or around the ladder during the 10 minutes between the time he set up and ascended the ladder and worked on it, and his descent from it, movants have established, *prima facie*, that they lacked actual or constructive notice of the debris. (*See Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986] [plaintiff did not prove constructive notice as no evidence that anyone, including plaintiff, saw paper before accident, and paper could have been deposited on ground only minutes or seconds before accident; irrelevant that plaintiff saw others papers on another part of steps approximately 10 minutes before fall]; *Rodriguez v Dormitory Auth. of State*, 104 AD3d 529 [1st Dept 2013] [no testimony indicating how long condition which caused plaintiff's fall had been in location of accident]; *Arredondo v Valente*, 94 AD3d 920 [2d Dept 2012] [defendants established lack of constructive notice of defective torch by plaintiff's deposition testimony that torch was working properly before accident]; *see also Gray v City of New York*, 87 AD3d 679 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012] [plaintiff's deposition testimony established that defect was not visible and apparent]; *Alami v 215 E. 68th St., L.P.*, 88 AD3d 924 [2d Dept 2011] [defendants did not sufficient time to discover and remedy dangerous condition as incident occurred 10 minutes after laundry detergent was spilled and was reported less than five minutes before fall]; *Alini v Lucent Technologies, Inc.*, 59 AD3d 471 [2d Dept 2009] [soapy condition did not exist for sufficient length of time to impute constructive notice to defendant as condition was created five to 10 minutes before accident]).

III. PLAINTIFFS' CROSS MOTION

Plaintiffs' cross motion is deemed timely as they moved for judgment on the identical grounds raised by defendants in their motion. (*See Homeland Ins. Co. of New York v Ntl. Grange Mut. Ins. Co.*, 84 AD3d 737 [2d Dept 2011] [untimely motion or cross motion for summary

judgment may be considered where timely motion for summary judgment made on nearly identical grounds]; *Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 71 AD3d 538 [1st Dept 2010], *affd on other grounds* 18 NY3d 1 [2011] [motion court did not err in considering defendants' untimely cross motion to extent it addressed Labor Law claims that were subject of plaintiffs' timely motion]). Nor is plaintiffs' failure to annex a full copy of the pleadings fatal. (*Carey v Five Bros., Inc.*, 106 AD3d 938 [2d Dept 2013] [motion should not have been denied on ground that defendants failed to submit pleadings as plaintiffs had already submitted pleadings in support of their motion and defendants expressly incorporated plaintiffs' exhibits into their cross motion]).

In any event, as there exist factual issues underlying plaintiff's Labor Law 241(6) claim premised upon a violation of section 23 -1.7(e)(2) of the Industrial Code (*see supra*, II.B.), plaintiffs' motion for summary judgment on this claim is denied.

IV. MOTION BY TITAN

As Shawmut's own records establish that Titan employees performed their work the night before the accident and were not working at the time of plaintiff's accident, and given plaintiff's testimony that there was no debris present under or around his ladder in the 10 minutes before his accident, there is no basis for finding that Titan caused or created the debris which caused plaintiff's fall.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants 590 Madison Avenue, LLC and defendant/third-party plaintiff Shawmut Woodworking & Supply Inc. d/b/a Shawmut Design & Construction's motion

for summary judgment is granted to the extent of dismissing: (1) plaintiffs' Labor Law 240(1) claim; (2) plaintiffs' Labor Law 241(6) claim premised on violations of the Industrial Code except for Industrial Code 23 -1.7(e)(2); and (3) plaintiffs' Labor Law 200 and common law negligence claims; it is further

ORDERED, that plaintiffs' cross motion for summary judgment on their Labor Law 241(6) claim is denied; and it is further

ORDERED, that third-party defendant Titan Contracting Group's motion for summary judgment dismissing the third-party complaint is granted, and the third-party complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

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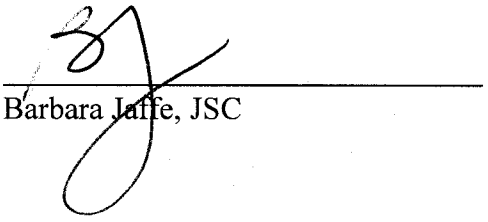

Barbara Jaffe, JSC

DATED: August 29, 2013
New York, New York