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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 101833/2010
GRONENTHAL, ROBERT
vs.
MUSART ASSOCIATES
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 is

is decided in accordance with the annexed decision.

RECEIVED
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IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/24/13

_____, 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 55

----------x

ROBERT GRONENTHAL and MAUREEN MULLARKEY,

Plaintiffs,

Index No.101833/2010

-against-

DECISION/ORDER

EXTELL DEVELOPMENT COMPNAY, EXTELL 115 WEST 57TH STREET LLC, MUSART ASSOCIATES, LLC, NEWMARK & COMPNAY REAL ESTATE, INC. formerly known as NEW PLAN EXCEL REALTY TRUST, 120 WEST 58TH LLC and METROPOLITAN CLUB, INC.,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Robert Gronenthal commenced the instant action to recover damages for personal injuries he allegedly sustained when he slipped and fell on December 7, 2007. Defendants Musart Associates, Newmark & Company Real Estate, Inc. and Newmark & Company Real Estate, Inc. f/k/a New Plan Excell Realty Trust (the "Musart defendants") now move for summary judgment dismissing plaintiff's complaint on the ground that they owed no duty to protect against the hazard which allegedly caused plaintiff's injures as the hazard was

readily observable by plaintiff. For the reasons set forth below, the Musart defendants' motion is denied.

The relevant facts are as follows. This action arises from an incident that occurred while plaintiff Robert Gronenthal, an elevator mechanic, was performing elevator maintenance at the property located at 119 West 57th Street, New York, NY (the "Property). The Property is owned and maintained by the Musart defendants. In his bill of particulars, plaintiff alleges that on December 5, 2007, around 3:00 pm, he was walking back down the stairs leading up to the Property's motor room when he was caused to slip and fall due to ice that was underneath snow on the stairs. During his deposition, plaintiff testified that it had snowed earlier that morning and he remembers that there was "maybe an inch, inch and half" of untouched snow that was present on the stairs when he first went up them and that he did not think the condition was dangerous. Plaintiff also testified that he did not see any ice on the stairs prior to his fall but that after he fell he turned around and "looked up at the step and [he] saw a shiny glow of ice."

It is well settled that "[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances including likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk." *Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). However, the First Department has found that "[t]he duty of an employer or owner to provide workers with a safe place to work does not extend to hazards which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience." *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434, 434-35 (1st Dept 2013). Accordingly, an owner who moves for summary judgment on the ground that it owed no duty to the worker to protect against the hazard which caused the worker's injuries has

the initial burden of making a *prima facie* showing that the hazard which caused the worker's injury was readily observable by reasonable use of the senses in light of the worker's age, intelligence and experience. *See id.*; *see also Bombero v. NAB Constr. Corp.*, 10 A.D.3d 170 (1st Dept 2004).

In the present case, the Musart defendants have failed to establish their *prima facie* right to summary judgment on the ground that they did not owe a duty to plaintiff as they have failed to demonstrate that the hazard which caused plaintiff's injury was readily observable by the reasonable use of his senses. The Musart defendants argue in their motion that they are entitled to summary judgment as plaintiff admitted during his deposition that he saw the snow on the steps prior to his fall. However, this argument misconceives the nature of plaintiff's claim. Plaintiff does not allege that the snow caused his fall but that he slipped and fell due to ice underneath the snow. Thus, the hazard that allegedly caused defendant's accident was the ice underneath the snow and not the snow itself. The fact that plaintiff testified that there was "maybe an inch, inch and a half" of untouched snow on the stairs when he initially went up them actually supports the conclusion that he could not have readily observed any ice on the stairs as it was covered by the snow. Based on the foregoing, the Musart defendants have failed to make a prima facie showing that the hazard at issue, the ice under the snow, was readily observable by plaintiff. Similarly, the Musart defendants have failed to make a *prima facie* showing that they did not have constructive notice of the ice based on their argument that the hazard was just as visible to plaintiff as it would have been to them. *See Bodtman*, 105 A.D.3d at 435 (holding that since the hazard causing plaintiff's injuries was just as apparent to plaintiff as it would have been to defendants, "plaintiff could not hold defendants liable based on a theory that defendants had constructive notice of such condition").

To the extent that defendants move to dismiss plaintiff's allegations that the Musart defendants violated several administrative codes and OSHA, such relief is improper on a motion for summary judgment as plaintiff is not making a separate claim based upon the violation of those codes but is alleging that any violation is evidence of the Musart defendants' negligence.

To the extent the Musart defendants present further arguments relating to notice in their reply papers and assert for the first time that they are entitled to summary judgment as there was a "storm-in-progress" at the time of plaintiff's alleged accident, such arguments are without merit. The court will not address a movant's argument made for the first time in its reply papers as "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion." *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 (1st Dept 1992); *see also Lumbermens Mutual Casual Company v. Morse Shoe Company*, 218 A.D.2d 624 (1st Dept 1995) ("[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion"); *see also Allstate Insurance Company v. Dawkins*, 52 A.D.3d 826 (2d Dept 2008).

Accordingly, the Musart defendants' motion for summary judgment is denied as they have failed to demonstrate that they owed no duty to plaintiff. This constitutes the decision and order of the court.

Dated: 9/24/13

Enter: _____
J.S.C.