SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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INDEX NO. 154557/2015

DENNIS BURKE,

MOTION DATE 09/22/2017

Plaintiff,

MOTION SEQ. NO. 003 004 005

- v -

SNOWPLOW LH LLC,250 EAST 57TH STREET, LLC, and LEND LEASE (US) CONSTRUCTION LMB, INC.

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that the motion (sequence number 003) of defendant 250 East 57th Street, LLC for summary judgment is GRANTED and the complaint and all cross claims are severed and dismissed against such defendant, and the Clerk is directed to enter judgment in favor of such defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the motion (sequence number 004) of plaintiff Dennis Burke for partial summary judgment on the issue of liability under Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-1.7 (d) is GRANTED only to the extent of dismissing the affirmative defenses of culpable conduct on the part of plaintiff, but is otherwise DENIED; and it is further

ORDERED that the motion (sequence number 005) of defendants Snowplow LH LLC, Lend Lease (US) Construction LMB, Inc., the City of New York, New York City Department of Education, and New York City School Construction Authority for summary judgment is GRANTED to the extent of:

(1) severing and dismissing the complaint and all cross claims against defendants City of New York, New York City Department of Education, and New York City School Construction Authority, and the Clerk is directed to enter judgment in favor of such defendants with costs and disbursements as taxed by the Clerk; and

(2) dismissing plaintiff's Labor Law § 240 (1) claim, Labor Law § 241 (6) claim, except as to the alleged violation of 12 NYCRR 23-1.7 (d), and Labor Law § 200 and common-law negligence claims.

DECISION

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

In this action arising out of a construction site accident, defendant 250 East 57th Street, LLC moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against it (motion sequence number 003).

Plaintiff Dennis Burke moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 241 (6) and for an order setting this matter down for a trial on damages only (motion sequence number 004).

Defendants Snowplow LH LLC (Snowplow), Lend Lease (US) Construction LMB, Inc. (Lend Lease), the City of New York, New York City Department of Education, and New York City School Construction Authority (collectively, the Snowplow defendants) move, under CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 005).

Background

Plaintiff alleges he suffered injuries on January 6, 2015 on a construction project located at 252 East 57th Street in Manhattan (hereinafter, the premises).

Nonparty New York City Educational Construction Fund owned the premises on January 6, 2015. Snowplow was the lessee of the premises on that date. By agreement dated December 3, 2013, Snowplow hired Lend Lease as a construction manager to build two schools as well as retail space.

Plaintiff was a laborer employed by nonparty Navillus Tile, Inc., d/b/a Navillus Contracting (Navillus), the concrete superstructure subcontractor. Under its subcontract, Navillus agreed to "remove all snow and ice as may be required or requested for the proper protection and prosecution of the Work".

Plaintiff testified that he was employed on January 6, 2015 by Navillus. He had been working for Navillus for a couple of months as a rod buster. Plaintiff was required to carry steel rods. Plaintiff arrived at the work site at about 7:00 a.m. According to plaintiff, the area where he was going to be working that day was open to the elements. Plaintiff's job was to carry steel rods to the lathers who would form steel rebars into supports or reinforcements for the concrete, which would eventually be poured to form the structure of the building. A crane deposited the rods on the open plywood deck. Plaintiff sorted the rods into sizes and widths, and then brought them with a coworker to marked areas on the deck. The rods were between 10 and 30 feet long and a half-inch to an inch-and-a-quarter in diameter. Plaintiff carried the rods with a coworker to the northwest corner of 57th Street. He had to drop rods about 30 yards from where they had been deposited by the crane, as well as at intermediate points along the way.

On the date of the accident, plaintiff was working on the highest floor at the time. It was an open plywood deck on which workers were constructing the supporting structures for the building being erected at the time. It was icy, stormy, and sleeting that morning. Before starting work that day, plaintiff asked the deputy lather foreman whether they would be working that day, and he was told that they were. Plaintiff first walked around the deck to locate the various markings on the deck which indicated the size of the rebar. After 7:00 a.m., while plaintiff and his partner were carrying the first load of rods or rebars, plaintiff slipped on the slippery plywood decking which was slick from the snow and ice falling. He continued to work after he fell but slipped and fell on the plywood decking three additional times that morning while carrying the rebar and while walking on the deck. Plaintiff complained to the lather foreman about the accumulation of ice on the deck where he was required to walk. In response, they did not stop working, but instead used a leaf blower to try to blow the ice off the deck and the rebars lying on the deck. Plaintiff's foreman told him to slow down "but keep moving". At approximately 8:00 a.m., plaintiff fell backwards, landing on his back. After 10:00 a.m., he fell again on the slippery deck and injured himself while carrying lighter steel rebars on his own. "Hawkeye," Lend Lease's safety representative, closed the

entire deck at 11:00 a.m. because it was slippery from snow and ice. Hawkeye accompanied plaintiff to street level where he was seen by medical personnel.

Joseph Dazzo (Dazzo), Lend Lease's superintendent, testified that it had a site safety manager whose nickname was Hawkeye. Hawkeye oversaw safety on the project. He had the ability to stop work if he saw a safety violation on the work site. Dazzo visited the plywood deck that morning and observed at about 9:00 or 10:00 a.m. that there was "probably some accumulation of snow" on the deck while men were working. According to Dazzo, it was Navillus's responsibility to clean the snow.

A daily site safety log dated January 6, 2015 states that "Dennis Burke (Navillus laborer) slipped on snow covered plywood while carrying rebar and injured his back. BEST squad was notified".

A certified weather report for observations taken in Central Park on January 6, 2015 indicates that sometime between 7:51 a.m. and 8:39 a.m., the visibility dropped from 10 miles to 1.75 miles. The report shows that relative humidity increased from 41 to 59 per cent, snow began to fall, and continued to fall until approximately 1:00 p.m.

By decision and order dated March 1, 2016, the court consolidated this action with Burke v City of New York, Index No. 159057/15 (Sup Ct, NY County) under this index number.

Previously, 250 East 57th Street, LLC moved for summary judgment claiming it did not own, manage or maintain the premises on the date of the accident. By decision and order dated July 1, 2016, the court denied 250 East 57th Street, LLC's motion for summary judgment because it did not establish prima facie entitlement to summary judgment. Specifically, the court found that 250 East 57th Street, LLC failed to authenticate the memorandum of ground lease or ground lease allegedly in place at the time. Additionally, the court held that 250 East 57th Street, LLC could not rectify its proof for the first time in its reply papers.

DISCUSSION

"It is well settled that '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'" (Pullman v Silverman, 28 NY3d 1060, 1062 [2016], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the moving party makes

a prima facie showing, "the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action'" (Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 [2014], quoting Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012]).

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega, 18 NY3d at 503 [internal quotation marks and citation omitted]).

250 East 57th Street, LLC's Motion for Summary Judgment

250 East 57th Street, LLC again moves for summary judgment, arguing that it did not owe a duty to plaintiff. To support its position, 250 East 57th Street, LLC submits an affidavit from David Lowenfeld (Lowenfeld), a board member of Monarch Street Partners II LLC, the managing member of 250 East 57th Street, LLC. Lowenfeld states that the ground lease, the first amendment to the ground lease, and the assignment and assumption of ground lease annexed to his affidavit are true and accurate copies of these documents, since he signed on behalf of 250 East 57th Street, LLC.

In response, plaintiff argues that: (1) it is for the court to determine whether the assignment and assumption of ground lease dated March 29, 2012 was a valid assignment; and (2) only the memorandum of ground lease was recorded by an official agency.

"Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises" (Balsam v Delma Eng'g Corp., 139 AD2d 292, 296 [1st Dept 1988], lv dismissed and denied in part 73 NY2d 783 [1988]). Based upon Lowenfeld's affidavit, 250 East Street, LLC has sufficiently authenticated the lease dated May 13, 2008, and an assignment and assumption of ground lease dated March 29, 2012, indicating that Snowplow LLC assumed the ground lease on March 29, 2012, prior to plaintiff's injury (see Muhlhahn v Goldman, 93 AD3d 418, 418 [1st Dept 2012] ["(a)n affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence"]). The assignment and assumption of ground lease transferred all rights and interests in the subject premises from 250 East 57th Street, LLC to Snowplow LLC. In addition, the Snowplow defendants have admitted that the New York City Educational Construction Fund owned the premises on the date of the accident, and that Snowplow was the lessee on January 6, 2015.

Although plaintiff argues that the documents were not recorded by an official agency, "[a] defendant will not be subject to liability in a personal injury action if he sufficiently demonstrates that he was not the owner of the property where the injury took place, regardless of whether the

transfer of property was recorded" (Woroniecki v Tzitzikalakis, 255 AD2d 509, 509 [2d Dept 1998]).

Accordingly, 250 East 57th Street, LLC is entitled to dismissal of the complaint and all cross claims against it.

Plaintiff's Claims Against the Municipal Defendants

The Snowplow defendants argue that the municipal defendants cannot be held liable for plaintiff's injury, because they were not owners, contractors or agents. Plaintiff does not dispute that these defendants are not responsible parties under the Labor Law. Plaintiff also does not assert that any of these defendants committed an affirmative act of negligence that resulted in his injury. Therefore, plaintiff's claims against the municipal defendants must be dismissed.

Labor Law § 240 (1)

The Snowplow defendants also move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim claiming plaintiff was not subject to an elevation-related risk. Plaintiff did not argue that this statute applies in opposition to their motion. Consequently, plaintiff's section 240 (1) claim must be dismissed.

Labor Law § 241 (6)

Labor Law § 241 (6) provides as follows:

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in

connection therewith, shall comply with the following requirements:

> ***
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"Labor Law § 241 (6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]). This statute is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 503 [1993]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct," rather than a provision reiterating common-law safety standards (St. Louis v Town of N. Elba, 16 NY3d 411, 414 [2011]). In

addition, the plaintiff must also show that the violation was a proximate cause of the accident (Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 271 [1st Dept 2007], lv denied 10 NY3d 710 [2008]).

Unlike Labor Law § 240 (1), the plaintiff's comparative negligence is a valid defense to liability pursuant to Labor Law § 241 (6) (Long v Forest-Fehlhaber, 55 NY2d 154, 161 [1982], rearg denied 56 NY2d 805 [1982]; Once v Service Ctr. of N.Y., 96 AD3d 483, 483 [1st Dept 2012], lv dismissed 20 NY3d 1075 [2013]). Courts have held, however, that the plaintiff's comparative negligence "may require an apportionment of liability but does not absolve defendants of their own liability under section 241 (6)" (Maza v University Ave. Dev. Corp., 13 AD3d 65, 66 [1st Dept 2004]).

Plaintiff's verified bill of particulars alleges violations of 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (1), 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-1.8 (c) (2), and 12 NYCRR 23-1.8 (c) (3).

Plaintiff moves for partial summary judgment based upon a violation of section 23-1.7 (d). For their part, the Snowplow defendants move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, arguing that plaintiff's cited regulations are inapplicable or were not violated under the circumstances. In opposition to the Snowplow defendants' motion, plaintiff only addresses section 23-1.7 (d), and has

therefore abandoned reliance on the remaining regulations (see Cardenas v One State St., LLC, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal…"]). Therefore, the court shall only consider the alleged violation of section 23-1.7 (d).

12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) provides as follows:

> "(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".

Plaintiff seeks summary judgment under Labor Law § 241 (6) based upon a violation of section 23-1.7 (d). According to plaintiff, the evidence indicates without contradiction that he slipped and fell while he was working on snow and ice, which had not been removed, sanded or covered.

The Snowplow defendants argue, in support of their own motion, that plaintiff's accident was caused by his own culpable conduct. As argued by the Snowplow defendants, they were never advised about the slippery conditions that allegedly caused the accident. In addition, the Snowplow defendants contend that

plaintiff continued to work (and not seek medical attention) after multiple falls in readily observable icy conditions.

At the outset, the court notes that Lend Lease, as the construction manager, may be held liable under section 241 (6) as an agent of the owner if "the manager had the ability to control the activity which brought about the injury" (Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]). The Snowplow defendants do not dispute whether Lend Lease performed essentially the same functions as a general contractor on the project for purposes of liability under section 241 (6).

In addition, Snowplow has not contested that it may be held liable under the statute. Indeed, "[t]he term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (Zaher v Shopwell, Inc., 18 AD3d 339, 339 [1st Dept 2005], quoting Copertino v Ward, 100 AD2d 565, 566 [2d Dept 1984]). Snowplow was a lessee of the premises and hired Lend Lease to perform construction work there.

Section 23-1.7 (d) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (see Rizzuto, 91 NY2d at 351 ["12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles . . ."]).

Moreover, courts have held that a section 241 (6) claim based upon a violation of section 23-1.7 (d) is properly sustained where there is evidence that "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard" (Booth v Seven World Trade Co., L.P., 82 AD3d 499, 501 [1st Dept 2011] [internal quotation marks and citation omitted]; see also O'Brien v Port Auth. of N.Y. & N.J., 131 AD3d 823, 825 [1st Dept 2015], affd as mod on other grounds 29 NY3d 27 [2017]; Temes v Columbus Ctr. LLC, 48 AD3d 281, 281 [1st Dept 2008]; cf. DeStefano v Amtad N.Y., 269 AD2d 229, 229 [1st Dept 2000]). In Booth, the plaintiff tripped on an object covered by snow and ice (Booth, 82 AD3d at 501). The First Department held that the plaintiff's accident occurred on a floor, platform or other working surface within the meaning of section 23-1.7 (d), and that "[t]he evidence that plaintiff slipped on snow and ice raises a triable issue as to whether 'someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard'" (id.).

The Court explained that:

> "[b]ecause plaintiff's accident occurred almost seven hours after the snow began and several hours after other workers were on the premises, there are triable issues as to whether someone within the chain of construction knew about the presence of snow and ice and acted negligently in

> failing to remove it, or at least rope off the dangerous areas, prior to the accident .... It is enough that employees were on site for an extended period before plaintiff's accident, and that it was snowing for a sufficient time to provide the required notice"

(id.).

In Temes, in reinstating the plaintiff's Labor Law § 241 (6) claim based on a violation of 12 NYCRR 23-1.7 (d), the First Department held that

> "the evidence that plaintiff slipped on a patch of ice obscured by construction debris raises a triable issue as to whether someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard"

(Temes, 48 AD3d at 281 [internal quotation marks and citation omitted]).

Here, it is undisputed that plaintiff's accident occurred on a "floor" within the meaning of section 23-1.7 (d) (see id.).

However, the court concludes that there are triable issues of fact as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard" (Booth, 82 AD3d at 501). Plaintiff testified that after 7:00 a.m., he slipped on the plywood decking which was slick from the ice and snow falling. He continued to work but slipped and fell three additional times while carrying rebar or walking on the deck. Plaintiff

complained to the lather foreman about the accumulation of ice on the deck where he was required to walk. Nevertheless, they did not stop working but instead used a leaf blower to blow the ice off the deck and the rebar lying on the deck; plaintiff's foreman told him to slow down "but keep moving". Plaintiff also observed workers pushing wood to clear the deck of snow or ice. Plaintiff fell on the deck while walking back from the northeast corner of the deck at approximately 8:00 a.m. and fell again after 10:00 a.m. while carrying rebar. After 11:00 a.m., Lend Lease's safety representative closed the entire deck because it was slippery with snow and ice. It is for the jury to decide whether Navillus's use of the leaf blower and wood was reasonable under the circumstances.

Although the Snowplow defendants argue that they did not have notice of the snow and ice, the Court of Appeals has held that the absence of notice is irrelevant to the imposition of vicarious liability under section 241 (6) (see Rizzuto, 91 NY2d at 352 ["Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law § 241(6) liability"]).

Further, the court notes that "[a]lthough the storm in progress doctrine applies in common-law negligence cases it does not apply to 12 NYCRR 23-1.7 (d) because '[t]hat subdivision includes no exception for storms in progress'" (Booth, 82 AD3d at 502, quoting *Rothschild v Faber Homes*, 247 AD2d 889, 890 [4th Dept 1998]).

That said, however, the court observes that the Snowplow defendants have not submitted sufficient evidence to raise a triable issue of fact as to plaintiff's comparative negligence, given that he was following the directions of his foreman (see Rubino v 330 Madison Co., LLC, 150 AD3d 603, 604 [1st Dept 2017] ["Appellants fail to point to any evidence that would support a finding that plaintiff was comparatively negligent, since he was acting pursuant to his foreman's instructions…"]).

In view of the above, plaintiff's Labor Law § 241 (6) claim is dismissed except as predicated upon 12 NYCRR 23-1.7 (d). In addition, plaintiff's motion for partial summary judgment under Labor Law § 241 (6) based upon a violation of Industrial Code § 23-1.7 (d), and the branch of the Snowplow defendants' motion seeking dismissal of this claim as predicated on this section, are denied, except that affirmative defenses of culpable conduct on plaintiff's part must be dismissed.

Labor Law § 200 and Common-Law Negligence

The Snowplow defendants argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed because: (1) they did not direct or control the method or manner in which plaintiff performed his work; and (2) the storm-in-progress rule precludes a finding of liability against them.

In opposition, plaintiff contends that Lend Lease may be held responsible under the common law and under section 200, since it had control over the deck and chose to shut it down only after it became extremely dangerous on which to work.

Labor Law § 200 (1) states, in part, that:

"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."

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143-144 [1st Dept 2012]). Liability under section 200 is governed by common-law principles (Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]).

"Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (Prevost v One City Block LLC, 155 AD3d 531, 533-534 [1st Dept 2017], quoting Cappabianca, 99 AD3d at 144).

By contrast, "[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (Vazquez v Takara Condominium, 145 AD3d 627, 628 [1st Dept 2016] [internal quotation marks and citation omitted]). However, the Court of Appeals has held that the duty under section 200 and the common law "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" (Bombero v NAB Constr. Corp., 10 AD3d 170, 171 [1st Dept 2004]).

Although the Snowplow defendants argue that they did not exercise supervision over plaintiff's work "supervisory control is a necessary element to a Labor Law § 200 claim . . . only [w]here the alleged defect or dangerous condition arises from the contractor's methods" (Roppolo v Mitsubishi Motor Sales of Am., 278 AD2d 149, 150 [1st Dept 2000], quoting Comes v New York

State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; accord Raffa v City of New York, 100 AD3d 558, 558 [1st Dept 2012]; cf. Ocampo v Bovis Lend Lease LMB, Inc., 123 AD3d 456, 457 [1st Dept 2016] ["(t)he evidence indicated that the ice resulted solely from such work, inasmuch as the building was sealed off from the elements, and no companies other than plaintiff's employer and defendant were permitted to be present on the contamination site"]). There is no evidence in the action at bar that the snow and ice resulted from the performance of the work.

Therefore, the court must consider whether plaintiff's section 200 and common-law negligence claims are barred under the storm-in-progress doctrine.

"It is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (Pippo v City of New York, 43 AD3d 303, 304 [1st Dept 2007]; see also Powell v MLG Hillside Assoc., 290 AD2d 345, 345 [1st Dept 2002] ["The 'storm in progress' defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways"] [citation omitted]). This rule applies equally to contractors (see e.g. Coyne v Talleyrand Partners,

L.P., 22 AD3d 627, 629 [2d Dept 2005], lv denied 6 NY3d 705 [2006]). "[E]vidence of a storm in progress presents a prima facie case for dismissal" (Powell, 290 AD2d at 345).

Applying these principles, plaintiff testified that it was icy and sleeting on the morning of his accident. In addition, the certified weather report for January 6, 2015 indicates that at about 8:39 a.m., snow began to fall, and continued to fall until about 1:00 p.m. Plaintiff further testified that Lend Lease's representative shut down the work on the top floor at about 11:00 a.m. Thus, the Snowplow defendants have made a prima facie showing of entitlement to summary judgment (see Bradshaw v PEL 300 Assoc., 152 AD3d 635, 636 [2d Dept 2017] ["defendants established their prima facie entitlement to

judgment as a matter of law by submitting their deposition testimony and certified weather reports, which demonstrated that there was a storm in progress at the time of the plaintiff's accident"]). Plaintiff has not contested the Snowplow defendants' application of the storm-in-progress doctrine and has thus failed to raise an issue of fact. Accordingly, plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed.

10/15/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE