SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

MARCO CARRION,

Plaintiff,

Index No.: 162311/2015
Motion Sequence Nos.: 002, 003

- against -

DECISION/ORDER

LSG 365 BOND STREET LLC, THE LIGHTSTONE GROUP and LETTIRE CONSTRUCTION CORP.,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

This is a labor law case in which plaintiff alleges violations under Labor Law 240, 241 (6), and 200, as well as claims under common law negligence. Discovery is complete, and plaintiff has filed the note of issue. In motion sequence 002, plaintiff seeks partial summary judgment against all defendants, on the issue of liability under Labor Law 240 (1), and an immediate trial on damages. In motion sequence 003, all defendants move for summary judgment dismissing all claims against them. Motion sequence numbers 002 and 003 are consolidated for disposition and resolved as follows:

During the relevant period, plaintiff was a rebar lather[1] working for non-party Rapid Tied Rebar LLC (Rapid Tied) on the construction of a new building located at 363-365 Bond Street in Manhattan (the project). Defendants LSG 365 Bond Street LLC and the Lightstone Group (collectively, 365 Bond) owned the project and Lettire Construction Corporation (Lettire) was the project's construction manager. Rapid Tied was a subcontractee of RC Structures, Inc. (RCS), which itself had entered a subcontract with Lettire for concrete superstructure and carpentry work.

[1] A rebar, short for reinforcing bar, is one of the steel bars used to reinforce concrete and masonry structures.

Rapid Tied transported, laid out, and tied in rebar before concrete was poured to form the structural walls, columns, beams and floors of the building being constructed.

Plaintiff had worked for Rapid Tied for less than a month when the accident occurred. On that date, April 7, 2015, he states, he worked on the seventh floor of the building, which at the time was the top floor. Pursuant to his supervisor's orders, he alleges, he moved, carried, laid out, and tied off rebar for the first time in his career. The complaint indicates that the rebar pieces were around thirty feet long. Plaintiff states that he carried the individual bars over his shoulder and placed them in the decking.[2] While he worked, he wore a hardhat, harness, gloves, safety goggles, and steel-toe boots (Plaintiff's Aff. in Support, ¶ 19). After he had carried over thirty loads, the pile of rebar pieces purported was around three feet high. Plaintiff stepped onto the pile with his left foot and pushed off with his right foot so that he could reach the top of the pile and put his load of rebar there. At that point, the pile moved underneath him, and he tripped and fell backwards, and several rods dropped on his shoulder and arm. As a result, he allegedly sustained serious injuries. According to plaintiff, the seventh floor, the top floor, was vulnerable to inclement weather, and the intermittent rain had made the partially tied rebar on the floor "wet and slippery" (Complaint, ¶ 78).[3]

In this lawsuit, plaintiff asserts as his first cause of action that defendants are strictly liable under Labor Law § 240 (1). The complaint asserts that because plaintiff fell from the top of the slippery pile of rebar pieces and the pile allegedly was three feet high, and because he was not the sole proximate cause of the accident, this is an elevation-related injury subject to the statute. As a second cause of action, the complaint states that defendants were not compliant with the following

[2] The concrete is then poured over the rebar. Together, the rebar and concrete formed the building's superstructure.
[3] In his motion, plaintiff contends that his assessment of the weather is borne out by the daily log reports at exhibit H, at pages 238-44 (NYCEF Doc. No. 28). Exhibit H, however, is 32 pages long and includes data for April 6 rather than April 7.

provisions of the Industrial Code: 12 NYCRR §§ 23-1.5 (c), 23-1.7 (b), 23-1.7 (d), 23-1.7 (e), 23-1.15, 23-1.16, 23-1.17, 23-1.22, and 23-2.2. Finally, the complaint alleges statutory and common law negligence as the third and fourth causes of action, respectively. According to the complaint, in its capacity as contract manager Lettire 1) hired the subcontractors, including RCS, 2) coordinated the various subcontractors' schedules, 3) provided the project safety program which set forth the prevailing health and safety guideline, 4) was responsible for safety compliance, 5) hired the safety managers and coordinated their schedules, 6) provided the site safety superintendents, 7) presided over team meetings with the project's forepersons, subcontractors, and site safety managers, 8) had the power to stop work on the project if there were unsafe working conditions or other issues, and 9) investigated and prepared the accident reports whenever a worker sustained an injury at the project site. This is pertinent to Lettire's liability, or lack thereof, for negligence at the worksite.

Summary Judgment Standard

On a motion for summary judgment, the movant has the burden of providing evidence sufficient to show the absence of any material factual issues (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept Aug. 8, 2017]). If the movant makes this showing, the burden shifts to the opposing party to show that a triable issue of fact exists (*Kramer v Greene,* 142 AD3d 438, 440 [1st Dept 2016]). When no factual disputes affect the outcome of the claim, summary judgment is appropriate (*see Cordiero v Shalco Investments*, 297 AD2d 486, 495 [1st Dept 2002]).

Labor Law § 240 (1) Claim

In his motion for partial summary judgment, motion sequence number 002, plaintiff argues that the evidence undisputedly shows that his injuries were the result of an elevation-related risk. He contends that the height of the pile, which he states was around three feet, is sufficient under

the Scaffold Law (Labor Law § 240 [1]). Proximate cause, plaintiff argues, is unequivocally present as well because his fall was the result of his exposure to an elevation-related risk without the protection of proper safety devices such as a step or ramp which would have reduced the risk of an elevation-related injury. He asserts that there were uncovered open spaces between the rebar of ten to twelve inches. He states that the situation was rendered more hazardous because, given the rainy weather, the rebars were more slippery. Having established a prima facie case, he continues, the burden shifts to defendants to defeat his motion. This, plaintiff argues, is not possible, as "defendants cannot factually demonstrate that safety devices were furnished or made readily available to plaintiff to adequately protect him from falling during the performance of his assigned work," and therefore, there are no triable issues (Plaintiff's Aff. in Support, ¶ 69). The 365 Bond defendants, he notes, are undisputedly the owners of the premises, and as such they are subject to strict liability under the provision. In addition, plaintiff contends that Lettire was sufficiently involved in supervising the project and ensuring the safety of the workers to be strictly liable as well. He therefore seeks judgment against under Labor Law §240 (1) against all defendants and an immediate trial on damages.

In opposition, defendants state that summary judgment is appropriate on plaintiff's Labor Law § 240 (1) claim, but in their rather than plaintiff's favor. According to defendants, even if the Court accepts plaintiff's contentions, it must conclude that plaintiff's injuries clearly were not the result of a height-related risk under a falling object or a falling worker theory. Even if the Court declines to dismiss the claim, defendants state, it should find that there are factual questions which preclude judgment at this juncture. Among other things, defendants state, it is not clear how heavy the rebar plaintiff carried was, whether plaintiff fell or kneeled, whether the rebar fell on him, whether the beam from which plaintiff purportedly fell was sufficiently high to be within the ambit

of Labor Law § 240 (1), and whether the weather was rainy and caused slippery conditions on the accident date.

Defendants state that testimony and expert affidavits either refute or contradict plaintiff's contentions on these issues. They note that at his deposition Lettire employee Mike Addesa testified that the rebar pile was only eight inches high, and that fellow construction worker Marcial Rivera testified the pile was somewhere around ten inches high. A step or ramp, they state, was not required because their evidence shows that the height differential was insubstantial. They cite *Jackson v Hunter Roberts Construction Group, LLC* (161 AD3d 666 [1st Dept 2018] [six to ten inches) and *Sawczyszyn v New York University* (158 AD3d 510 [1st Dept 2018] [eight to twelve inches]) for the proposition that the height differential was not sufficient to bring plaintiff's alleged fall within the scope of Labor Law § 240 (1). Furthermore, they state, there is conflicting testimony regarding whether plaintiff fell, whether there was a significant gap in the rebar, or whether he was hit by the rebar he had held. Their expert, moreover, has sworn that contrary to plaintiff's testimony, rebar does not become slippery when wet.

In reply, plaintiff adheres to his original position. Moreover, he claims that *Brown v 44 St. Development, LLC* (48 Misc 3d 234 [Sup Ct NY County 2015], *aff'd*, 137 AD3d 703 [1st Dept 2016]), which defendants attempt to distinguish, is controlling because there, too, the plaintiff slipped on rebar (*see also Brown v 44 St. Development, LLC*, 137 AD3d 703, 704 [1st Dept 2016] [plaintiff's fall through a rebar deck to plywood twelve to eighteen inches below "was the result of exposure to an elevation related hazard"]). He argues that defendants point to deposition testimony and expert testimony which supposedly refutes his statement, but that these individuals lack firsthand knowledge of the underlying facts. He suggests that, given the important remedial purposes of the statute, any contradictions to or inconsistencies in plaintiff's position are irrelevant

(relying on *Landi v SDS Williams St., LLC*, 146 AD3d 33, 38 [1st Dept 2016]). He repeats that, according to his sworn testimony, the height differential was two feet or more.

Under Labor Law § 240 (1), otherwise known as the scaffold law,

> contractors, owners, and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure [to] furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed, and operated as to give proper protection to a person so employed.

The statute intends to protect laborers from "'significant risk[s] inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured'" and must be "'related to the effects of gravity'" (*Toefer v Long Island Railroad*, 4 NY3d 399, 407 [2005] [quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991)]). As Labor Law § 240 (1) aims to protect workers from such hazards, courts "liberally construe[] [it] to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006]). The test is two-fold: there must be a violation, and the violation must be a contributing cause of the accident (*see Blake v Neighborhood Housing Servs. Of New York City, Inc.*, 1 NY3d 280, 287 [2003]). The second prong is as necessary as the first; if a plaintiff falls due to "general hazards specific to a workplace" Labor Law 240 (1) does not apply (*Makarius v Port Authority of New York & New Jersey*, 76 AD3d 805, 807 [1st Dept 2010]). If the plaintiff satisfies the two-part test, however, absolute liability exists and therefore "contributory negligence cannot defeat the plaintiff's claim" (*Blake*, 1 NY3d at 287).

In this case, plaintiff alleges that the failure to provide a step or stool was a proximate cause of his accident. Based on the arguments the parties have presented in their papers and at oral argument, the Court concludes that there is a factual dispute over the height differential which

makes partial summary judgment improper. Plaintiff's sworn statement as to the height of the rebar pile and the gaps between the rebar is sufficient, coupled with his description of the accident, to show a prima facie case of liability under labor Law §240 (1) (*see Santos v Condo 124 LLC*, 161 AD3d 650, 654 [1st Dept 2018]). *Brown*, on which plaintiff relies, further supports plaintiff's position that there is no "'bright-line minimum height differential that determines whether an elevation hazard exists'" (*Brown*, 137 AD3d at 704 [twelve-to-eighteen inch fall through a gap in the rebar] [citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 (1st Dept 2011) (four-to-six feet elevation)]). Instead, the critical question is whether there was exposure to an elevation-related risk (*Brown*, 137 AD3 at 704). Thus, plaintiff's testimony – that he was required to step up one-and-a-half to two feet high on a slippery surface to reach the next level of rebar – creates a prima facie case that an elevation-related risk existed even if the height differential was more minor than plaintiff suggests.[4]

In opposition, however, defendants point to evidence suggesting the height differential may not have been sufficient to trigger strict liability under the Labor Law and to evidence which contradicts plaintiff's account in critical respects. The Court concludes that this is sufficient to raise triable factual issues (*see Santos*, 161 AD3d at 654). Furthermore, if plaintiff is correct as to the height, questions of fact remain "as to whether [defendants] provided adequate protection" (*O'Brien v Port Authority of New York & New Jersey*, 29 NY3d 27, 33 [2017]). Contrary to plaintiff's contentions, the disputes and controversies here are critical. Plaintiff's reliance on *Landi* (146 AD3d at 38) is misplaced because there the court had concluded that the height differential was sufficient and there was proximate cause. Defendants submit additional evidence

[4] The Court further notes that defendants' expert opines that "the alleged incident vertical change in elevation was less than 19 inches" (Aff of Preston R. Quick, at ¶ 3), a number higher than that posited by Adessa and Rivera.

contradicting that of plaintiff, including evidence suggesting that there were no gaps in the rebar through which plaintiff could have slipped and that the height differential was legally insignificant.[5]

Accordingly, the Court denies the motion for partial summary judgment on this issue. For the same reason, the Court denies the prong of defendants' motion, motion sequence number 003, which seeks summary judgment dismissing this cause of action. The Court need not discuss the parties' numerous additional arguments on this issue but notes that it has considered them fully.

Labor Law § 241 (6) Claim

In addition to its request to dismiss plaintiff's CPLR § 240 (1) cause of action, defendants seek dismissal of plaintiff's claim that defendants are liable under CPLR § 241 (6). Although plaintiff asserts numerous Industrial Code violations in his complaint, in response to defendants' motion to dismiss his Labor Law 241 (6) cause of action he relies exclusively on Industrial Code § 23-1.7 (d). As defendants note, plaintiff implicitly waives his arguments as to the other cited provisions. Therefore, the Court limits its discussion to the purported violation of Industrial Code § 23-1.7 (d).

Industrial Code § 23-1.7 (d) states:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in 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.

The provision "concerns slipping hazards in a passageway" (*Aguilera v Pistilli Construction & Development Corp.*, 63 AD3d 763, 765 [2nd Dept 2009] [citations and internal quotation marks

[5] Defendants argue that a "ramp, runway, stairway, ladder or hoist" was unnecessary because the height differential was less than nineteen inches (*see* Quick Aff, ¶ 3). Plaintiff, however, does not suggest that defendants should have provided something as substantial as a ramp or a runway, but the more modest support of a step or a stool so that employees did not have to climb onto or over the rebar.

omitted]) but, contrary to defendants' suggestion, by its very language it extends to areas other than passageways and stairwells. Although, as defendants state, an accident which occurs on "muddy ground in an open area exposed to the elements" does not trigger liability under Industrial Code 23-1.7 (d) (*O'Gara v Humphreys & Harding, Inc.*, 282 AD2d 209, 209 [1st Dept 2001]), open areas "within the perimeter of the building that was being constructed" are considered "floors" within the meaning of the provision (*Cohen v New York City Indus. Development Agency*, 30 Misc 3d 1235 [A], 2011 NY Slip Op 50365 [U], **2 [Sup Ct NY County 2011] [citing *Temes v Columbus Centre LLC*, 48 AD3d 281, 281 (1st Dept 2008) (large open space in building's basement was a floor within the meaning of the provision)]).[6] Here, plaintiff fell while loading rebar at the work site. Based on the caselaw and the language of the code, plaintiff's injury occurred in an area that is encompassed by Industrial Code § 23-1.7 (d), and dismissal on this ground is not proper.

Any mud or water on the surface is a "foreign substance" within the meaning of the Industrial Code § 23-1.7 (d) because it is not "an integral part of plaintiff's work" (*Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]). Defendants next contend, however, that the provision is inapplicable because it was not raining heavily on the accident date. They note that their expert relied on the meteorological report from that day when he concluded that little or no rain hit the ground that day prior to the accident.[7] They point out that under CPLR § 4528, "any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated" (also citing *Perez v Canale*, 50 AD3d 437, 437 [1st Dept 2008]). They additionally annex the daily log from the project, which states that the

[6] This matter was appealed as to the court's findings on indemnification, and affirmed on those grounds, in *Cohen v New York City Industrial Devel. Agency*, 91 AD3d 416 [1st Dept 2012]).
[7] The expert opined that most of the .01 inches of precipitation recorded for that day evaporated before it hit the ground.

weather was overcast and was not windy.[8] At deposition, they state, Adessa noted both that work was discontinued when there were poor weather conditions and that even when wet, the rebar, which was ribbed, was not a slipping hazard.

Plaintiff opposes this prong of the motion, stating that there is a triable issue as to whether Industrial Code § 23-1.7 (d) applies. He states that his sworn testimony creates a triable issue as to whether it was necessary to step up onto the beam such that the worksite was "elevated." He points out that his deposition testimony indicated that it was drizzling rather than pouring, notes that the area was open and uncovered, and asserts that his supervisor, Molina, said the area was likely damp at the time. He points out that, despite defendants' position that the area posed no slipping hazard, the work was stopped during periods of heavy rain. In reply, defendants state that plaintiff has not substantiated his arguments. They contend that the language of the industrial code provision limits the applicability of the rule to encompass only hallways, passageways, stairways, and the like, and it is meant to exclude open areas such as the one at hand.

The arguments defendants present here are best reserved for the factfinder at trial. There are issues of fact as to whether a slippery condition existed such that defendants are chargeable with a violation. Defendants may be held vicariously liable if plaintiff's foreman directed him to work in a muddy and wet area (*id.* at 542). Therefore, jury questions exist precluding dismissal of the cause of action (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 350-52 [1998]).

Labor Law § 200 and Common Law Negligence Claims

Defendants contend that this is a "means and methods" case – that is, they state that this is not a situation where general conditions of the worksite were unsafe but where the means and

[8] The log also indicates that in the two days prior to the incident, approximately .15 inches of rain fell.

methods of performing the work created the alleged danger. "Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Const. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). To state a valid claim, it is not enough to show that the owner or general contractor has general supervisory control; instead, the party in question must have "controlled *the manner in which the plaintiff performed his or her work*" (*id.* [italics in original] [citations omitted]). "The retention of general supervisory control or the mere presence of [the general contractor's] superintendent on the site does not suffice to show that [the general contractor] exerted the requisite control to be held liable" (*Wiley v Marjam Supply Co., Inc.*, -- AD3d --, 2018 NY Slip Op 07381, *3 [3rd Dept 2018]).

If, on the other hand, plaintiff's argument is that a dangerous condition existed on the premises, a different standard applies. Under this standard, proof of defendant's supervision and control over a plaintiff's work is not required" (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 489 [1st Dept 2018]). There is not automatic liability, however. If a defect or a dangerous condition exists and caused or contributed to the injury, liability only attaches if the owner or general contractor had actual or constructive notice (*id.*; *Vazquez v Takara Condominium*, 145 AD3d 627, 628 [1st Dept 2017]). If there is a triable issue regarding notice, summary judgment is not proper (*see Giancola v Yale Club of New York City*, 161 AD3d 695, 696 [1st Dept 2018]).

In their application to dismiss plaintiff's statutory and common-law negligence causes of action against them, defendants argue that they had no notice of the allegedly dangerous condition. Defendants argue that although the complaint suggests that they should have stopped work due to the slippery working conditions caused by the rain, it "does not claim that [d]efendants . . . had

'notice' of the allegedly wet conditions" (Defendants' Reply Aff in Support, ¶ 36). Indeed, defendants argue that the meteorological reports for that day show that the conditions were not sufficiently rainy to create a problem at the work site. Defendants add that, according to Adessa, the Department of Buildings regularly informed him when weather conditions necessitated a shutdown, and that no such warning issued on the accident date.

Defendants further argue that they did not exert supervision or control over the worksite. They cite plaintiff's deposition testimony, in which he asserts that his work was directed by his employer's foreman and occasionally by his boss' son. Plaintiff further testified that, although the site safety person told him how to carry the heavy weights and to protect his back, no one from Lettire told him what work to perform or gave him precise directions concerning his work with the rebar. In addition, they state that plaintiff was not aware of the presence of anyone from the owner's offices, that he used his own equipment, and that no one from either defendant provided him with additional equipment.

Plaintiff claims that defendants misunderstand the gist of his argument on this issue. He states that his "Labor Law 200 (1) claim is predicated on defendants' statutory negligence, as project owner and general contractor, for failing to timely/adequately exercise their retained authority to inspect and exercise control over the foreseeably dangerous wet and slippery working conditions [on the accident date] by stopping or suspending work operations that morning" (Plaintiff's Aff in Opp, ¶ 102). Thus, he contends that his argument relates to the condition of the workplace and it is unnecessary to establish supervision and control (*citing Borner v Fordham Univ.*, 124 AD3d 553 [1st Dept 2015] [icy condition at workplace raised issue of fact as to whether dangerous condition existed]; *Urban v No. 5 Times Square Devel., LLC*, 62 AD3d 553 [1st Dept

2009] [traffic on roadway and placement of barrier did not constitute "an inherently dangerous condition . . . for which defendant can be held liable . . . in the absence of supervisory control").

Defendants respond that the case is not one based on dangerous conditions at the work site. They state that because plaintiff's employer directed him to lift the rebar and place it in the decking, and because he allegedly fell when he stepped onto a beam of rebar his employer installed, "there is no question" that this is a means and methods case (Defendants' Aff in Reply, ¶ 34). Moreover, defendants reiterate that they did not supervise or control plaintiff's work, and that they did not even have any input into the work.

Moreover, even under the dangerous condition standard, defendants suggest that they should prevail because they had no notice whether there was a wet and slippery condition on the seventh floor. Defendants also challenge plaintiff's contention that the conditions at the work site were dangerous, stating that plaintiff's attorney's argument is entirely conclusory and based on unsubstantiated allegations. According to defendants, without factual evidence or the affidavit of an expert, plaintiff has not satisfied his burden on this issue. On the other hand, defendants note, they have submitted an expert affidavit and pointed to statements in the Adessa deposition transcript which refute plaintiff's claim. They add that under both statutory and common law, actual or constructive notice is necessary, and the lack of evidence of notice of either sort defeats plaintiff's common law negligence claim.

The Court adopts the reasoning of the Third Department in *Harrington v Fernet* (92 AD3d 1070, 1071 [3rd Dept 2012]), which concluded that where rain produces a slippery and muddy condition at the worksite, Labor Law § 200 and common law negligence claims may lie. The court stated that in this circumstance the allegation is that the "accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the worksite"

(*id.*). This liability exists only if the property owner or general contractor "created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time" (*id.* [citations and internal quotation marks omitted]). Plaintiff has not sustained his burden of showing that the owner had notice of the condition, however. Indeed, plaintiff's deposition testimony indicates that there was no communication with 365 Bond and that, to his knowledge, 365 Bond was not present at the site. In addition, plaintiff submits no evidence showing that the owner had timely, or any, notice of the alleged slippery condition (*see Doodnath v Morgan Contracting Corp.*, 101 AD3d 477, 478 [1st Dept 2012]). Moreover, even if the owner was aware that the work site might become slippery when wet, this general knowledge is "insufficient to establish constructive notice of the specific condition causing plaintiff's injury" (*Solazzo v New York City Transit Auth.*, 6 NY3d 734, 735 [2005]).

The Court reaches a different conclusion as to the general contractor. Lettire's supervisory activity at the site and the presence of its employees there, including the ability to stop work when weather conditions created a hazard, create an issue of fact as to its liability (*see Harrington*, 92 AD3d at 1071). Plaintiff states Lettire knew the floor would become slippery when wet. Lettire's general awareness that the work site might become slippery when wet. Moreover, he alleges that the condition was "visible and apparent" and had "exist[ed] for a sufficient length of time prior to the accident to permit [Lettire's] employees to discover and remedy it" (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 255 [1st Dept 2005] [citation and internal quotation marks omitted]). Defendants' contradictory evidence as to the weather conditions on that day merely create triable issues. Similarly, defendants' statement that the rebar they used does not become slippery under normal rain conditions also creates issues for the factfinder.[9] The Court rejects plaintiff's position

[9] There is some testimony that with sufficiently heavy rainfall, things may become hazardous.

that Labor Law § 200 and common law negligence are distinguishable for the purposes of this motion.

Conclusion

For the above reasons, it is

ORDERED that motion sequence number 002 for partial summary judgment is denied; and it is further

ORDERED that motion sequence number 003 for summary judgment dismissing the case is denied except as to the Labor Law 200 and common law negligence claims asserted against the owner, and those claims are severed and dismissed.

Dated: 12/19/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.