

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25605
W/kmg

_____AD3d_____

Argued - December 8, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2009-07786

DECISION & ORDER

Thomas Mitthauer, et al., respondents,
v T. Moriarty & Son, Inc., appellant.

(Index No. 36081/07)

Segal McCambridge Singer & Mahoney, Ltd., New York, N.Y. (Gregory N. Harris of counsel), for appellant.

Siler & Ingber, LLP, Mineola, N.Y. (Robert M. Brinen of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (Lewis, J.), entered July 20, 2009, as denied that branch of its motion which was for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action is granted.

On June 14, 2006, the injured plaintiff, Thomas Mitthauer (hereinafter Mitthauer), was working as a journeyman electrician for a subcontractor on a parking garage construction project at the John F. Kennedy International Airport. He allegedly was injured when he fell to the ground upon taking his first step exiting a portable toilet located on the construction site. The defendant was the general contractor on the project. Mitthauer and his wife, suing derivatively, commenced this action against the defendant alleging common-law negligence, violations of Labor Law § 200 and 241, and violations of Rule 23 of the Industrial Code of the State of New York (12 NYCRR 23-1.1 *et seq.*). The defendant moved for summary judgment dismissing the complaint, and the plaintiffs cross-moved

for summary judgment on the complaint. In an order entered July 20, 2009, the Supreme Court denied both the motion and the cross motion. The defendant appeals from so much of the order as denied that branch of its motion which was for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action. We reverse the order insofar as appealed from.

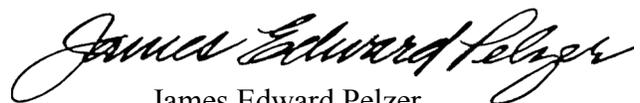
When asked at his deposition what caused his fall as he stepped from the portable toilet, Mitthauer testified: “I couldn’t honestly tell you. I was mystified myself.” Mitthauer also testified that, while the portable toilet was wobbly or “helter skelter” on some days, the toilet did not wobble when he exited it on the date of the accident. Mitthauer described the surface on the ground within a five-foot radius of his fall as unlevel, with “hills” and “valleys” caused by vehicles.

The defendant established its prima facie entitlement to judgment as a matter of law by demonstrating, through the submission of Mitthauer’s deposition testimony, that he was unable to identify a dangerous or defective condition actually causing his fall (*see Kaplan v Great Neck Donuts, Inc.*, _____AD3d_____, 2009 NY Slip Op 09432 [2d Dept 2009]; *DeNicola v Costello*, 44 AD3d 990; *Rodriguez v Cafaro*, 17 AD3d 658). In response to the defendant’s showing, the plaintiffs failed to raise a triable issue of fact. Proof of general ground conditions within a five-foot radius of the accident is irrelevant, and, thus, insufficient to raise a triable issue of fact, in the absence of evidence that the same conditions existed at the specific location where Mitthauer stepped (*see Pinto v Metropolitan Opera*, 61 AD3d 949). The reply affidavit submitted by the plaintiffs in further support of the cross-motion, in which Mitthauer claimed, inter alia, that the portable toilet was unsteady and improperly placed, contradicted the earlier deposition testimony that it was steady at the time of the accident, and merely raised feigned issues of fact designed to avoid the consequences of the earlier deposition (*see DeNicola v Costello*, 44 AD3d at 990). The reply affidavit also failed to address the condition of the ground at the specific area where Mitthauer’s fall occurred (*see Pinto v Metropolitan Opera*, 61 AD3d at 949).

The plaintiffs’ remaining contentions are without merit.

DILLON, J.P., FLORIO, HALL and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court