

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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JUAN-CARLO ENRIQUEZ,

Plaintiff,

-against-

Index No:8019/06
Motion Date: 5/28/08
Motion Cal. No: 11
Motion Seq. No: 1

B&D DEVELOPMENT, INC., G&I DEVELOPMENT
CORP., AUTUMN EQUITIES, LLC, GDY
PROPERTIES, INC. and UNITED PROPERTY
GROUP, LLC.,

Defendants.

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The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR § 3212, dismissing plaintiff’s complaint against defendants B & D Development, Inc., G & I Development Corp., Autumn Equities, LLC, GDY Properties, Inc. and United Property Group, LLC.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmations in Opposition-Exhibits.....	5 - 7
Reply Affirmation-Exhibits.....	8 - 10

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

This is a Labor Law action to recover damages for injuries allegedly sustained on July 13, 2005, by plaintiff Juan-Carlo Enriquez (“plaintiff”), an employee of nonparty Bedrock Concrete, that occurred while Bedrock, which was hired to perform excavation and foundation work, was pouring concrete foundation at premises owned by the defendants B & D Development, Inc., G & I Development Corp., Autumn Equities, LLC, GDY Properties, Inc. and United Property Group, LLC. (“defendants”) located at 392 Essex Street, Brooklyn, New York. Plaintiff, while cutting wood to build cement forms, was hit and cut on his knee by the saw. Plaintiff alleges violations of sections 200, 240 and 241 of the Labor Law. Defendants move for summary judgment dismissing each of the causes of action set forth in the complaint on the grounds that defendant did not direct supervise or control plaintiff’s work, which is required to impose liability pursuant to section 200 of the Labor

Law; the accident did not involve an elevation-related risk within the meaning of section 240(1) of the Labor Law; and defendants did not violate any Industrial Code provisions that would create liability within the meaning of section 246(1) of the Labor Law.¹

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2d Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

“Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace [see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)]. To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury... (citations omitted).” Mas v. Kohen, 283 A.D.2d 616 (2001); see, Kwang Ho Kim v. D & W Shin Realty Corp., 47 A.D.3d 616 (2nd Dept. 2008); Ragone v. Spring Scaffolding, Inc., 46 A.D.3d 652 (2nd Dept. 2007); Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 850 (2nd Dept. 2006); Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 (2nd Dept. 2005); Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2003). Further, liability attaches where the owner or contractor created the hazard, or had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition. See, Giambalvo v. Chemical Bank, 260 A.D.2d 432 (2nd Dept. 1999); Leon v J & M Peppe Realty Corp., 190 A.D.2d 400 (1st Dept. 1993). Where the dangerous condition is the result of the contractor’s methods and the owner exercises no supervisory control over the construction, liability will not attach to the owner. See, Young Ju Kim v. Herbert Const. Co., Inc., 275 A.D.2d 709 (2nd Dept. 2000); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993). Likewise, “where the alleged defect or dangerous condition arises from the subcontractor’s methods and the owner or general contractor exercise no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200 (citations omitted).” Lombardi v. Stout, 80 N.Y.2d 290 (1992); Peay v. New York City School Const. Authority, 35 A.D.3d 566 (2nd Dept. 2006); Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 850 (2nd Dept. 2006). Moreover, the common-law duty to provide employees with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the employee is to perform or defects the employee is hired to repair. Hansen v. Trustees of Methodist Episcopal Church of Glen Cove, 51 A.D.3d 725 (2nd Dept. 2008). See, Gasper v. Ford Motor Co., 13 N.Y.2d

¹In his opposing papers, plaintiff withdraws his section 240(1) Labor Law claim.

104 (1963).

In the case at bar, defendants demonstrated their entitlement to dismissal of the common law and Labor Law § 200 claims by proffering the depositions of plaintiff, who testified that he was supervised only by his boss from Bedrock Concrete. Plaintiff, in response to defendants' prima facie showing, failed to present sufficient evidence to raise a triable issue of fact with regard to whether defendants maintained the requisite supervision or control over the activity which caused the injury to plaintiff, in order to avoid its occurrence or correct an unsafe condition under Labor Law § 200. See, Locicero v. Princeton Restoration, Inc., 25 A.D.3d 664 (2nd Dept. 2006); Braun v. Fischbach and Moore, Inc., 280 A.D.2d 506 (2001). That defendants' may have possessed overall supervisory authority over the entire project is insufficient. "Mere 'monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200' (Dalanna v. City of New York, 308 A.D.2d 400, 764 N.Y.S.2d 429 [2003])." Carty v. Port Authority of New York and New Jersey, 32 A.D.3d 732 (1st Dept. 2006). "[F]or liability to be imposed, the owner must direct and control the manner in which the work is performed, not merely possess general supervisory authority (citations omitted)." Parisi v. Loewen Development of Wappinger Falls, 5 A.D.3d 648 (2nd Dept. 2004); Cuartas v. Kourkoumelis, 265 A.D.2d 293, 294 (2nd Dept. 1999); see, also, McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 A.D.3d 796 (2nd Dept. 2007)["General supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability"]; Pensabene v. San Francisco Const. Management, Inc., 27 A.D.3d 709 (2nd Dept. 2006)["The fact that the . . . defendants exercised some general supervisory duties at the work site was insufficient to raise a triable issue as to whether it exercised the type of supervision or control over the injured plaintiff's activities necessary to hold them liable for his injuries]. Since there is no issue of fact as to whether defendants exercised control over the injured plaintiff's work or had knowledge of any unsafe condition that caused the accident, plaintiff's claims alleging common-law negligence and a violation of Labor Law § 200 must be dismissed. See, Mercado v. TPT Brooklyn Associates, LLC, 38 A.D.3d 732 (2nd Dept. 2007). His section 241(6) claim suffers the same result.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed." Reinoso v. Ornstein Layton Management, Inc., 19 A.D.3d 678 (2nd Dept. 2005); see, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993); Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2nd Dept. 2007). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a "specific" standard of conduct, and that such violation was the proximate cause of his injuries. See, Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501-502 (1993); Furino v. P & O Ports, 24 A.D.3d 502, (2nd Dept. 2005); Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 (2nd Dept. 2005); Vernieri v Empire Realty Co., 219 A.D.2d 593, 597 (1995). In order for a contractor or an owner to be liable under Labor Law § 241(6), the plaintiff must prove that his injuries were proximately caused by a violation of an Industrial Code provision that sets forth

specific requirements of conduct. See, Mercado v. TPT Brooklyn Associates, LLC, 38 A.D.3d 732 (2nd Dept. 2007); Rivera v Santos, 35 A.D.3d 700 (2nd Dept. 2006); Jicheng Liu v Sanford Tower Condominium, 35 A.D.3d 378 (2nd Dept. 2006); Portillo v Roby Anne Dev., LLC, 32 A.D.3d 421 [(2nd Dept. 2006)]. In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case. See, Locicero v. Princeton Restoration, Inc., 25 A.D.3d 664 (2nd Dept. 2006); Vernieri v Empire Realty Co., *supra*.

Plaintiff alleges that defendants violated sections 23-1.7(d) and (e) of the Industrial Code, which provide:

(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.

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The 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.

Liability cannot be imposed upon defendants by either of these provisions; plaintiff testified that at the time the accident happened, he was “on the dirt, that it was mislevel, and, and, with rocks and wood.” As the accident at issue occurred neither “on floor, passageway, walkway, scaffold, platform or other elevated working surface,” section 23.1.7 (d) is inapplicable. “[T]he open, ground level of the work site where the injured plaintiff fell did not constitute a passageway, walkway, or other elevated working surface contemplated by 12 NYCRR 23-1.7(d) (citations omitted).” Porazzo v. City of New York, 39 A.D.3d 731 (2nd Dept. 2007); see, also, Bond v. York Hunter Const., Inc. 270 A.D.2d 112 (1st Dept. 2000), *aff’d* 95 N.Y.2d 883 (2000). And, as the accident occurred neither in a passageway or any “parts of floors, platforms and similar areas where persons work,” section 23 1.7(d) does not apply. The alleged debris at issue, the rocks and pieces of wood represented “the accumulation of debris [that] was an unavoidable and inherent result of [the cement] work” being done. See, Bond v. York Hunter Const., Inc., *supra*. “Section 23-1.7(e)(2), which applies to tripping hazards in working areas, also is inapplicable because plaintiff testified that he tripped over

demolition debris created by him and his coworkers, which was an integral part of the work being performed.” Salinas v. Barney Skanska Const. Co., 2 A.D.3d 619 (2nd Dept. ,2003); Alvia v. Teman Elec. Contracting, Inc., 287 A.D.2d 421 (2nd Dept. 2001). Here, as was the case in Alvia:

12 NYCRR 23-1.7(e)(2) requires working areas, such as a floor, to be kept clear of debris and "scattered tools and materials insofar as may be consistent with the work being performed.’ Alvia was employed as a ‘stripping foreman,’ that is, he removed the wood used to hold the concrete casting in place. At the time of the accident, he was stacking plywood. Thus, the plywood on which he tripped was not "debris" or "scattered materials" but was material used in the actual task he was performing. The regulation does not apply where ‘the object on which plaintiff tripped [] was an integral part of the work he was performing’ (citations omitted).

Plaintiff also claims that defendants violated section 23.2.1(b) of the Industrial Code, which provides that “[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.” However, sections 23-2.1(b) of the Industrial Code “lacks the specificity required to support a cause of action under Labor Law § 241(6).” Madir v. 21-23 Maiden Lane Realty, LLC, 9 A.D.3d 450 (2nd Dept. 2004). He also claims that defendants violated section 23-2.2 of the same code, which, although it applies to concrete work, it has no applicability or relevance to plaintiff’s claims. See, Thompson v Ludovico, 246 A.D.2d 642 (2nd Dept. 1998); Parisi v. Loewen Development of Wappinger Falls, 5 A.D.3d 648 (2nd Dept. 2004); supra; Vernieri v Empire Realty Co., supra.

Accordingly, as plaintiff failed to raise a triable issue of fact sufficient to defeat defendants’ prima facie establishment of their entitlement to summary judgment, the motion by defendants B & D Development, Inc., G & I Development Corp., Autumn Equities, LLC, GDY Properties, Inc. and United Property Group, LLC., must be granted, and the complaint hereby is dismissed.

Dated: July 21, 2008

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J.S.C.