

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. LAWRENCE V. CULLEN
Justice

IAS PART 12

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SALVATORE CONTINO,

Plaintiff,

Index No.: 2181/06

- against -

Motion Date: 5/28/08

MERRILL LYNCH & CO., INC., ABM
JANITORIAL SERVICES, ABM INDUSTRIES
INC., ACSS and STRUCTURE TONE, INC.,

Motion No. 6

Motion Seq. No. 1

Defendants.

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The following papers numbered 1 to 11 on this motion:

	<u>Papers Numbered</u>
Defendant Merrill Lynch's Notice of Motion-Affirmation- Affidavits-Service-Exhibits	1-4
Plaintiff's Affirmation in Opposition- Affidavits-Exhibits	5-8
Defendant's Reply Affirmation-Exhibits	9-11

By notice of motion, defendant, Merrill Lynch Co., Inc. (Merrill Lynch), seeks an order of the Court, pursuant to CPLR § 3212, and § 3211(a)(7), granting them summary judgment and dismissal of plaintiff's complaint based on Labor Law §§ 200, 240(1) and § 241(6).

Plaintiff files an affirmation in opposition and defendant replies.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a work place accident at approximately 7:30 p.m. on February 16, 2005, on the 27th floor of the World Financial Center, North Tower, 250 Vesey Street, New York, N.Y.

At that time and place, plaintiff, an employee of Sherland and Farrington (S&F), was engaged in the process of tearing up and removing carpet tiles and replacing the same with new carpet tiles.

Plaintiff was injured when an unsecured hutch/credenza/bookshelf that had been on top of a desk slipped off and fell on top of him, hitting his head, neck and shoulders.

The desk, which had been elevated anywhere from three eighths to three quarters of an inch had been lifted from the floor by an employee of S&F using a hydraulic jack. The desk was lifted so that the carpet mechanics, plaintiff included, could remove the old carpet tiles, repair the floor if needed and install new tiles.

Plaintiff was on his hands and knees, sweeping the floor with a hand broom when the shelving came crashing down on him.

Plaintiff testified that he received all instructions and orders from Willie Gonzalez, Sr., his supervisor at S&F.

Merrill Lynch was the owner of the premises. Plaintiff's employer, S&F was hired by Merrill Lynch for the carpet installation. Generally, a company called Structure Tone, Inc., was hired by Merrill Lynch to act as general contractor, or managing contractor to oversee a renovation project such as this one. In this instance, however, they were not. The Court notes, therefore, that the action against Structure Tone, Inc. was discontinued.

ABM, who was generally under contract with Merrill Lynch to perform janitorial work and engineering services at the subject premises was hired additionally, on this project, to do break down and removal of the office furniture for purposes of the carpet installation.

Catherine Marino, of Merrill Lynch testified on behalf of her company. Ms. Marino was the manager of operations at this address having to do with electrical, engineering, janitorial and maintenance staff. Although she described ABM's role in this carpet installation/renovation project as being one of "knocking down and assembling furniture" throughout the offices, she was unable to say what, exactly, that meant.

William Jomarron, the "facilities supervisor" for Merrill Lynch at that location was told by Catherine Marino that he would be the "point man" on the carpet installation project, and that

he would meet with representatives of S&F daily, while the project was ongoing.

There was no specific written contract between Merrill Lynch and ABM regarding their role in the project. Frank Nagrowski, a supervisory employee of ABM, testified on behalf of his company. He maintained that he received verbal orders and emails from William Jomarron concerning the work his company was to perform in support of the carpet installation project.

William Jomarron testified that he told S&F where to work based on a schedule he worked out with the office occupants. He maintained that he understood that ABM was to disconnect the furniture, to leave the least amount of furniture possible, and generally to make the offices "safe" in preparation of the carpet removal and installation.

As part of his coordination of the project, Jomarron maintained that he had a conversation with an ABM employee, while the project was ongoing, that removing the bookshelf/credenza, hutches was becoming a logistical problem. He stated that at some point he had a conversation with Jimmy Rivera of ABM, in which he instructed him to leave the unsecured hutches, but he couldn't recall if this conversation was before or after the accident. He conceded that ABM's initial instructions were to remove the hutches/shelves, but that it did in fact change while the project was ongoing.

As noted above, Frank Nagrowski, a supervisory employee of ABM testified at a deposition before trial. He maintained that no one ever gave him a definition of what was included in "knock down and assemble" furniture.

He testified that in their work in support of the carpet installation project they made a distinction between what they called "tall boys," a hutch or bookshelf attached or secured to a desk, and a "geiger," a hutch or bookshelf that was on top of a desk but not secured to the desk.

Nagrowski maintained that they received instructions from Merrill Lynch to unlock or disassemble the tall boys. They were not, however, expected to remove the "geigers" or unsecured shelves.

Esteban Santiago, another employee for ABM, testified that they were told by Merrill Lynch to remove from the offices only, the "pedestals" or the little cabinet with drawers that goes under your desk. He maintained that ABM had no responsibility to

remove or disassemble the hutches on top of the desks.

Mr. Santiago expressed the opinion that the bookshelf/credenza/hutch slipped off the desk because the desk was jacked up too high.

Defendant Merrill Lynch argues that under the circumstances the claim brought by plaintiff does not fit within the ambit of activities protected under Labor Law § 240(1). Moreover, defendant argues the industrial code provision cited by plaintiff, herein, is inapplicable to these facts, thereby excluding a claim pursuant to Labor Law § 241(6).

Finally, defendant points out that plaintiff received his work instructions from a supervisor at S&F and no one else, thus making Labor Law § 200 inapplicable as well.

Defendant ABM maintains, initially, that since as an entity they were neither the owner, general contractor, or agent of the owner they can not be held liable under any Labor Law provision. They argue further that they did not supervise plaintiff in the performance of his work on this project, nor they argue, did they control the manner, means or method of the performance of plaintiff's work.

Labor Law § 240(1)

"Section 240(1) of the Labor Law provides that 'All contractors and owners and their agents... who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning, or painting of a building or structure shall 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.' Section 240(1) of the Labor Law was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker (Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 520). Section 240(1) is to be liberally construed to achieve its objectives (65 NY2d, at 521)." Felkner v. Corning Inc., 90 NY2d 219, 223, 224, 660 NYS2d 349 (1997).

The only possible category under which plaintiff could claim that § 240(1) of the Labor Law applies would be "altering."

"It is now settled that the term 'altering' as used in section 240(1) 'requires making a significant physical change to the configuration or composition of the building or structure'

(Joblon v. Solow, 91 NY2d 457, 465 (1998)). Conversely, an alteration 'does not encompass simple, routine activities such as maintenance and decorative modifications' (Panek v. County of Albany, 99 NY2d 452, 458 (2003))." Sanatass v. Consolidated Inv. Co., Inc., 10 NY3d 333, 337, 858 NYS2d 67 (2008).

Clearly, changing the carpet tiles in the subject premises falls under the category of decorative modification, thus placing this activity outside the ambit of Labor Law § 240(1).

Moreover, even if plaintiff's claim fell within the accepted definition of alteration, the plaintiff still "...must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute (see, e.g. Pope v. Supreme KRW Constr. Corp., 261 AD2d 523; Baker v. Barron's Educ. Serv. Corp., 248 AD2d 655)." Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 268, 727 NYS2d 37 (2001). This is something plaintiff has failed to do.

Labor Law § 241(6)

At the outset, it should be noted that Labor Law § 241(6) applies to those categories "...in which construction, excavation, or demolition work is being performed..."

Construction work is defined in 12 NYCRR § 23-1.4(b)(13) as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures..."

As noted above the Court finds that plaintiff fails to meet the initial threshold requirement of constituting the only possible category of activity contemplated by the statute, namely alteration, or altering. Joblon v. Solow, 91 NY2d 457, 466, 672 NYS2d 286 (1998). "We look to the Industrial Code to define what constitutes construction work within the meaning of the statute..." Id. at 466.

Assuming, however, that plaintiff could conceivably fit within any of the statute's (§ 240(1) or § 241(6)) enumerated activities, the claim pursuant to Labor Law § 241(6) must still fail.

"To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code

provision which sets forth specific safety standards." See, Plass v. Solotoff, 5 AD3d 365, 357 (2d Dep't 2004); Ross v. Curtis Palmer Hydro Elec. Co., 81 NY2d 94 (1993); Ferrero v. Best Modular Homes, Inc., 33 AD3d 847, 851, 823 NYS2d 477 (2d Dep't 2006). "In addition, the provision must be applicable to the facts of the case." See, Singleton v. Citnalta Constr. Corp., 291 AD2d 393, 394 (2d Dep't 2002). Id. 851.

In this instance, plaintiff cites numerous Industrial Code provisions as part of the Bill of Particulars, including, 12 NYCRR, sections 23-1.30, 23-1.33(a), 23-1.5, 23-1.7, 23-2.1(a) and 23-3.3.

In response to defendant's arguments that none of these provisions apply, plaintiff argues that at least one provision, namely § 23-2.1(a)(2) applies.

That section of the Industrial Code provides as follows:

"(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Plaintiff argues that the hutch/credenza/bookshelf constituted material or equipment stored too close to the edge of the desk (platform or scaffold) as to endanger the plaintiff who was beneath the desk, hand sweeping the floor in preparation for laying down new carpet tiles.

Nothing in the definition section of Title 23 supports plaintiff's interpretation (12 NYCRR 23-1.4 Definitions, see, for example, definitions for various platforms and scaffolds including 23-1.4, (b) (10), (24), (25), (30), (34), (36), (37), (45), 51)). None of the definitions for the terms used in Part 23 allows for a desk to be considered a platform or scaffold subject to this rule.

Nor can any common sense understanding of the terms hutch/credenza or bookshelf be interpreted to be material or equipment as used in this rule, contrary to plaintiff's contention that the shelving in question was similar to a load needing securing as in Borschein v. Schuman, 7 AD3d 476, 776 NYS2d 307 (2004) (a steel beam) or Coque v. Wildflower Estates Dev. Inc., 31 AD3d 484, 818 NYS2d 546 (2006) (a pile of

shingles). Accordingly, "[t]he regulation(s) upon which the plaintiff [relies] do not apply to the facts of this case. See, Castillo v. Starrett City, 4 AD3d 320, 321 (2004); Lora v. Lexington Bus Co., 245 AD2d 489 (1997)." Mikcova v. Alps Mech., Inc., 34 AD3d 769, 770, 825 NYS2d 130 (2006). See also Mahoney v. Madeira Assoc., 32 AD3d 1303, 1305, 822 NYS2d 190 (2006).

Labor Law § 200

Both defendants, Merrill Lynch and ABM argue that they can not be held liable for plaintiff's injuries pursuant to any claim under Labor Law § 200 as they did not exercise any supervisory control over the work performed by plaintiff.

It is, of course, the burden of the party seeking summary judgment in the first instance to establish a prima facie case for the relief sought.

"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 eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 (2d Dep't 2003)).

"To establish liability for a violation of Labor Law § 200 and for common law negligence, the plaintiff must demonstrate that the defendants exercised supervision and control over the work performed, or had actual or constructive notice of the allegedly unsafe condition. (See, Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 (1981); Dennis v. City of New York, 304 AD2d 611, 512 (2003))." Pilch v. Bd. of Educ. of City of N.Y., 27 AD3d 711, 713, 815 NYS2d 617 (2d Dep't 2006).

Conversely, therefore, defendant must establish through admissible evidence that they had no supervisory control over the work performed, nor did they have actual or constructive notice of an alleged unsafe condition.

Defendant Merrill Lynch maintains that because plaintiff received his instructions for work from an S&F supervisor only, a Mr. Willie Gonzalez, Sr., a foreman for S&F, there can be no basis for plaintiff's Labor Law § 200 claim.

Defendant ABM makes the same claim, and adds that there was no nexus between them and plaintiff because they are neither the owner, general contractor, or agent of Merrill Lynch and therefore owe no duty to plaintiff.

In this instance both defendants Merrill Lynch and ABM have established a prima facie showing that neither entity provided direct supervision or control over plaintiff's work. Mercado VTPT Brooklyn Assoc., LLC, 38 AD3d 732, 733, 832 NYS2d 93 (2007).

In response, however, plaintiff raises triable issues of fact concerning both defendants' actual or constructive notice of what plaintiff characterizes as a dangerous condition created by the defendants' chosen manner and method of operation in preparing the work site for the work plaintiff ultimately performed.

Defendant Merrill Lynch, the owner, also acted in these circumstances as their own general contractor by providing their "point man," William Jomarron to oversee the carpet installation project on a daily basis. Through submission of Jomarron's own testimony, plaintiff established that Jomarron did more than simply visit the work site each day. Copolino v. Judlau Constr. Inc., 46 AD3d 733, 735, 848 NYS2d 346 (2007).

It was Jomarron's instruction to ABM employees to leave the unsecured desk top credenza/hutch/bookshelf behind when it became a logistical problem to remove it that created the alleged dangerous condition. Moreover, there is conflicting testimony from two ABM employees regarding their instructions from Merrill Lynch, through Jomarron as to what pieces of furniture were expected to be unlocked "the tall boys," or removed, the "pedestals," or left behind, the "geigers."

Thus, there are triable issues of fact precluding summary judgment as to "...whether [defendant Merrill Lynch] so controlled the activity bringing about the injury to enable it to avoid or correct an unsafe condition (Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 (1981))." Saccenti v. City of New York, 45 AD3d 665, 667, 846 NYS2d 236 (2007).

Under these circumstances defendant Merrill Lynch as owner and its own general contractor is not entitled to summary judgment on plaintiff's Labor Law § 200 claim. Gonzalez v. Glenwood Mason Supply Co., Inc., 41 AD3d 338, 339, 839 NYS2d 74 (2007). Defendant, ABM has likewise failed to establish that it was not acting as defendant Merrill Lynch's agent in this instance, thus precluding summary judgment to them under the same theory of liability. Id. at 339. See also Walls v. Turner Constr. Co., 4 NY3d 861, 863, 798 NYS2d 351 (2005)).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, defendant Merrill Lynch's motion for summary judgment is granted to the extent that any and all claims by plaintiff based on Labor Law § 240(1) and § 241(6) are hereby severed and dismissed as against defendant, Merrill Lynch, and the Clerk is directed to enter judgment on said claims in favor of said defendant; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
September 2, 2008

HON. LAWRENCE V. CULLEN
J.S.C.