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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J, OMANSKY PART 47

Justice

Garcia, Julio

- v -

Pepsico Inc

INDEX NO. 105748/9

MOTION DATE 7/31/02

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/13/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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JULIO GARCIA

Index No. 105748/99

Plaintiff,

DECISION AND ORDER

-against-

PEPSICO, INC. and HRH CONSTRUCTION CORP.

Defendant.

---------- X

PEPSICO, INC. and HRH CONSTRUCTION INTERIORS INC. i/s/h/a HRH CONSTRUCTION CORP.

Index No. 590318/00

Third-party Plaintiff,

-against-

A.S.F. GLASS CORPORATION and SENTRALE CONTRACTING,

Third-Party Defendants.

---------- X

SENTRALE CONTRACTING CORP.,

Index No. 590318/00

Second Third-party Plaintiff,

-against-

ANDY BUILDING CORP.

Second Third-Party Defendants.

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PAULA J. OMANSKY, J.:

In this action for personal injuries resulting from alleged negligence and violations of sections 200, 240, and 241(6) of the Labor Law, second third-party defendant Andy Lopes Building Corp. ("Lopes Building") moves for summary judgment dismissing all claims and cross claims against it on the ground that Lopes Building did

not have any control over the work which led to plaintiff Julio Garcia'S alleged injuries.

Third-party defendant and second third-party plaintiff Sentrale Contracting Corp. ("Sentrale") cross moves for summary judgment and to dismiss the third-party complaint and all cross-claims against it.

FACTS

On December 17, 1998, plaintiff Garcia, an iron worker and an employee of third-party defendant A.S.F. Glass corporation ("ASF Glass"), was injured while working at a construction project at the premises of defendant and a third-party plaintiff Pepsico Inc. ("Pepsico") located at 700 Anderson Hill Road, in Purchase, New York. At the time of his injury, Garcia was purportedly "shooting window heights[1]" on a street-level floor when he stepped into a hole created by Lopes Building for the pulling of wire or installation of pipe by other contractors.

Garcia states that at 7:30 a.m. he was instructed to "shoot wind marks" for window sills. Lopes Building alleges that Thomas Blumenfeld, a non-party and a foreman of ASF Glass, instructed Garcia to hold a wooden rule that extended ten feet. At the time Garcia was wearing a hard hat and a pair of "red wing" boots which were two or three months old.

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[1]The job of "shooting" window sills refers to the process of taking heights on the window frame to "level" them and to level each "leg" of the frame.

At the time of the accident Garcia was allegedly facing Blumenfeld who was directing plaintiff where to place the rule. Garcia stepped through a small square piece of wood, measuring 14 to 15 inches. Garcia states that his right foot slid into the hole and that the heel of his boot jammed into the edge of the hole. According to Garcia, the wood was not secured or attached to the floor in anyway. Plaintiff further testified that the wood twisted so that one corner of the wood fell into the hole.

The project in question was a combination construction and renovation site. Defendant and third-party plaintiff HRH Construction Interiors Inc. i/s/h/a HRH Construction Corp. ("HRH Construction") is alleged to be the general contractor of the site and the employer of Guy Penna the safety coordinator. HRH Construction hired Sentrale to perform excavation, backfilling, concrete work and other site work. In turn, Sentrale hired Lopes Building.

Lopes Building alleges that it was no longer working at ground level in December 1998 and that it was working on the upper or third level of the building, at the time of Garcia's alleged injury. According to Lopes Building, its concrete pouring work at ground level occurred between August and November of 1998 and was fully completed before Garcia's accident. Lopes Building maintains that it followed plans which required openings to be left in the floor which other trades would use for "pulling" wire or pipes.

Lopes Building maintains that its practice was to cover the openings with a piece of plywood, and nail down the plywood into the concrete. Once Lopes Building completed its foundation work, it maintains that its responsibility for the plywood coverings ended. Lopes Builders also contends that the plywood was moved by another contractor subsequent to Lopes Building's installation and prior to Garcia's accident.

According to Lopes Building, Sentrale's foreman or supervisor was responsible to inspect or examine the coverings after Lopes Building completed its work. Sentrale disputes this claim, stating that its inspection duties were more limited and that it had no duty to go back to the foundation area to examine the work of other contractors which could have removed or changed the plywood covering. According to Sentrale, it turned over the foundation area to HRH Construction which accepted the work without complaint. Sentrale maintains that HRH Construction is responsible for inspecting the work site and must examine the coverings. Sentrale states that it has no contract relationship with ASF Glass and did not supervise Garcia.

Pepsico and HRH Construction oppose the motion and cross motion, maintaining that the there is an issue of fact as to whether the plywood placed over the hole was adequate to cover the opening. In addition, Pepsico and HRH Construction state that there is also a question as to whether Lopes properly secured the

plywood against movement as required by sections 23-1.7(b)(1)(i) and 23-2.4(b (1)(i) of the Industrial Code.

DISCUSSION

The parties do not specifically address whether sections 240(1) or 241(6) of the Labor law apply to the underlying fact pattern (cf., Alvia v Terman Elec. Contractins, Inc., 287 AD2d 421, 422 [2d Dept 20021, lv, dismissed, 97 NY2d 749 [2002]; Becerra v Citv of New York, 261 AD2d 188, 189 [lst Dept 19991). Accordingly, this court is unable to determine, as matter of law, whether plaintiff Garcia was subject to a height-related risk or whether Lopes Building violated the Industrial Code by allegedly using a smaller piece of plywood and by allegedly failing to nail down the plywood. Movant and cross movant have also failed to present any expert testimony concerning the proper size of the plywood and whether the plywood must be nailed down under the presented circumstances.

As to plaintiff's negligence claims, section 200 of the Labor Law codifies a landowner's or a contractor's common-law duty to maintain a safe work place (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]; Ross v Curtis-Palmer Hvdro-Elec. Co., 81 NY2d 494, 505 [1993]). The fact that Lopes Building completed the work six weeks before plaintiff Garcia's accident, without more, is insufficient to warrant summary judgment (Tobias v DiFazio Elec. Inc., 288 AD2d 209, 210 [2d Dept 2001]). Liability

will only be imposed upon a party under section 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 352 [1998]; Lombardi v Stout, 80 NY2d 290, 295 [1992]). Hence, a party's duty under section 200 of the Labor Law is contingent upon contractual or other actual authority to control the activity bringing about the injury (Nowak v Smith & Mahoney, P.C., 110 AD2d 288, 289 [3d Dept 1985]) as well as proof that the defendant had actual or constructive notice of the alleged unsafe condition or location (Canning v Barney's New York, 289 AD2d 32, 33 [lst Dept 20011).

Lopes Building admits that it was contractually required to cover the opening it created but argues that the testimony of Michael Donnelly of Lopes Building and that of Albert Mazarri of Sentrale stand for the proposition that the plywood, which was placed on the foundation prior to the time of plaintiff's injuries, was adequate to cover the openings. Moreover, Lopes Building maintains that HRH Construction and some other contractor working on the foundation, had the duty to ensure that the coverings were still in place during the performance of that entity's portion of

the construction.

However, despite the assertions of Lopes Building, the present record does not, as a matter of law, exclude that entity's work as the source of the defective condition (cf., Knightner v Custom Window, Door Products, Inc., 289 AD2d 455, 456-457 [2d Dept 20011). The record is not clear as to whether Lopes Building properly covered the opening and/or secured the plywood to the floor after it completed its portion of the foundation work.

Lopes Building has not presented expert testimony as to the safety standards required at the site. Sentrale also has not presented any expert evidence on its cross application. When asked about whether he was aware of any the specific safety procedures concerning floor boards, Sentrale's witness, Mazzari, answered "no." Mazzari also stated:

> I think the term floorboard is really incorrect, That appears to be a piece of form plywood that just covered an opening, that was the only requirement. This is done as a matter of form, a matter of custom, on all jobs. As long as that opening is covered with a price of plywood, that is always adequate.

Mazzari Aff 2/26/ 2002 at 31, lines 12-18). Mazzari did not state that Lopes Building properly fastened the plywood to the flooring. *In* fact, this witness indicated that Lopes Building would not have fastened the plywood to the floor by testifying that securing the plywood to the floor would have been a "problem" "because you'd actually be drilling into a newly constructed concrete deck" (id. at 32, lines 7-8). According, to Mazzari, a contractor would just

lay plywood over the openings because nailing the plywood down would damage the surface of the newly poured concrete floor.

Donnelly's testimony concerning the safety procedures of Lopes Building contradicted Mazzari's concern about damaging the newly created foundation with nail holes. Donnelly stated that his employer, Lopes Building, would always cover any openings and "use a piece of plywood large enough to cover the hole and nail down some nails into the concrete'' (Donnell Aff 2/26/2002 at 14, lines 13-15).

Plaintiff Garcia clearly stated that the plywood was not nailed down at the time of his injury. The presented photographs do not show large enough sections of the flooring and the court is unable to detect from the submitted photographs whether there are nail holes in the concrete. Since it is unclear whether Lopes Building's method of securing the opening was adequate and in accordance with the governing safety requirements, the court is unable to find, as a matter of law, that Lopes Building left the work site in safe condition and that any later defect must have been caused by another contractor removing the nailed-down plywood. It is also not evident at this juncture whether Sentrale failed to inspect the area adequately or whether this party ignored a hazard created by another subcontractor.

Accordingly, both the motion and cross motion are denied as to the issue of liability. Given that the record contains gaps as to

which party, if any, created the hazard allegedly caused plaintiff's injury, the court is unable to determine whether the various contractual indemnity provisions have been triggered. Since the parties have not addressed the question of vicarious liability the court is unable to determine which party, if any, is liable under a theory of common-law indemnification

Accordingly, it is

ORDERED that the motion of Lopes Building for summary judgment on the second third-party complaint is denied; and it is further

ORDERED that the cross motion of Sentrale for summary judgment on the third-party complaint is denied.

DATED: September 17, 2002

ENTER:

PAULA J. OMANSKY
J.S.C.