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

PRESENT: PAULA J. OMANSKY PART 47

Justice

Marcinak, Steven

- v -

Tech. Mech Svcs.

INDEX NO. 119542/01

MOTION DATE 11/25/03

MOTION SEQ. NO. 003

MOTION CAL. NO. 63

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: 2/13/04

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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STEVEN G. MARCINAK Index No. 119542/01

Plaintiff,

DECISION AND ORDER

-against-

TECHNICAL MECHANICAL SERVICES, INC.

Defendant.

X

PAULA J. OMANSKY, J.:

In this action for negligence and violation of sections 240, 241(6) and 200 of the Labor Law, defendant moves for summary judgment and to dismiss the complaint.

FACTS

Plaintiff, an operating engineer, was allegedly injured on October 26, 1998 in the basement level of the building located at Four New York Plaza in Manhattan. The accident allegedly occurred in the course of plaintiff's employment with Sandhurst Associates ("Sandhurst"), a property management firm that operated the building owned by Chase Manhattan Bank and Manufactures Hanover Trust Company (the "Bank").

On the morning of the alleged accident, plaintiff walked to the engineer's office in the basement level of the building. While there he notice two co-employees, Mike Clarke and John Innmiott a supervisor, working on refrigeration machine number 3 (MR #3), which is the controller for the surface condenser. Oil was leaking from the machine. Later during the day plaintiff visited the basement and noticed that the oil problem had worsened.

Just prior to the accident plaintiff responded to a radio call for him concerning the problem with the RM-3 machine. He took the elevator down to the basement level, and walked approximately four feet. to the machine. Mike asked plaintiff to shut off the machine. He proceed toward the control panel on the other side of the machine, about 10 to 12 feet away. As he was walking toward the panel, his foot slipped and he fell. There was a quarter to half an inch of water on the floor all around the machine with oil floating onto the water.

Defendant, an industrial air conditioning service company, employs workers who visited the premises on a monthly basis to service the refrigeration machines and ensure their proper operation. Lawrence Pugh, an employee of defendant, testified that the a problem with the RM #3 began as early as December 31, 1994. At that time, the turbine was allegedly disassembled and examined off premises by General Electric, a non-party. The machine was returned to the premises in April 1998, but RM-3 did not immediately become operational again until Pugh and another employee of defendant worked for several weeks on it. During this time, new gaskets for the oil line flanges were installed to prevent oil from leaking at the flanges, which were ccnnected to the turbine's oil lines. The machine was put into operation in mid-May after it passed a test and was checked for oil leaks.

Defendant employees, Pugh and Frank Wibrew, inspected the

machines on May 15, 1998. These two men later adjusted RM-3's refrigerant charging unit on May 25, 1998. Pugh returned during the week of June 21, 1998 and again on July 24, 1998 and found that units Rm-2 and RM-3 were running normally. At some point, Pugh and Wilbrew returned to the building and tightened the oil piping flanges of RM-3 because they were leaking. On September 30, 1998, Wibrew performed "inspection service" and listed "no abnormalities to report."

On October 26, 1998, water overflowed from the condenser of refrigeration machine #3 and oil has leaked out of a turbine in the sub-basement where plaintiff performed most of his work. Plaintiff claims that he slipped and fell on a slippery surface of oil and water while making his way over the area to shut off the steam turbine and to assist in making emergency repairs.

DISCUSSION

In a related case captioned Marcinak v Chase Manhattan Bank ~~et. al~~ (Index No. 110510/01 [Sup Ct, New York County] (the Bank Case"), this court, in a decision and order dated July 2, 2002 (the "Bank Case order"), dismissed plaintiff's claims against the Bank: which were raised under section 240(1) of the Labor Law on the ground that the plaintiff's injury was not elevation-related or caused by the effects of gravity.

Plaintiff's claims under section 240(1) of the Labor Law are barred because the protections of that section do not apply to the

circumstances leading to plaintiff's injury (Bank Case order at 2; cf., Barwicki v Friars 50th Street Garage, Inc., 288 AD2d 14 [lst Dept 2001] [plaintiff slipped on grease and fell down into unguarded elevator shaft]; Noble v AMCC Corp., 277 AD2d 20 [lst Dept 2000] [worker fell off of top of boiler]). Accordingly, plaintiff's claims under section 240 of the Labor Law are also dismissed against the defendant in this action (see Bond v York Hunter Const., Inc., 260 AD2d 112 [lst Dept], affd 95 NY2d 883 [2000]).

In comparison, this court held in the Bank Case order that plaintiff, who was injured when he slipped on an oily floor while making his way to the boiler to perform repairs, is not barred from alleging a cause of action for violation of section 241(6) of the Labor Law (Bank Case order at 4). In particular, this court held that plaintiff alleges a violation of section 23-1.7(d) of the Industrial Code, "slipping hazards," which imposes a duty to remove any grease or foreign substance from floors, passageways or walkways "'which may cause slippery footing.'" (id. at 4-6).

Accordingly, plaintiff may also raise a claim against defendant for violation of section 241(6) of the Labor Law and that branch of the motion to dismiss is denied.

In the prior determination, this court dismissed the action against the Bank finding that the Bank did not have notice of the condition on that day and did not exercise direct supervision or control over plaintiff's work (Bank Case order at 5-6).

As to the remaining causes of action, section 200 of the Labor Law applies to agents of owners or general contractors which have the authority to exercise direct supervision and control over the work so as to enable that party to avoid or correct an unsafe condition (Everitt v Nozkowski, 285 AD2d 442, 443-444 [2d Dept 20011; see, Viera v Tishman Constr. Corp., 255 AD2d 235, 236 [lst Dept 1998]). However, the holding in the Bank Case which is based on Bank's relationship to the work does not automatically absolve the defendant in this matter.

That defendant did not supervise plaintiff's work is not dispositive in this instance since section 200 of the Labor law also applies to situations where the contractor/subcontractor negligently performed work which led to the plaintiff's injures (Schiulaz v Arnell Constr. Corp., 261 AD2d 247, 248 [1st Dept 1999]).

There is no issue of notice as defendant asserts because defendant states that its workers routinely inspected the RM #3 machinery and repaired the machine by replacing the gaskets for the oil line flanges oil. Defendant was aware of the history of leaks and frequently made inspection to check on that particular defect. However, the ultimate question of whether defendant negligently performed its duties is a matter for the fact finder.

This court rejects defendant's assertion that since it was not in privity with plaintiff, it is absolved from any liability for

injuries. Contrary to defendant's arguments, the Court of Appeal in Espinal v Melville Snow Contractors (98 NY2d 136 [2002]) did not hold that a contractual obligation never gives rise to tort liability in favor of a third party. Instead, the Court of Appeal in Espinal held that "under certain circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (id. at 139). More specifically, the Court of Appeals ruled that

> a party who enters into a contract to render services may be said to have assumed a duty of care -- and thus be potentially liable in tort -- to third persons: (1) where the contracting party in failing to exercise reasonable care in the performance of his duties, "launches a force on instrument of harm'"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties'; (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safety'

(id. at 140).

Defendant cannot reasonably deny that it had no a duty to the Bank to repair and maintain the subject equipment (see, Hunter v Lehrer McGovern Bovis, Inc., 299 AD2d 175 [1st Dept 2002]. Plaintiff has shown that defendant contracted with the bank and entered into a contract entitled "Service Agreement for the

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[1]The Court of Appeals is quoting H.R. Moch Co. v Rensselaer Water Co. 247 NY 160, 168 (1928).

[2]The Court of Appeals is citing Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 200, 266 (1990).

[3]The Court of Appeal is citing Palka v Servicemaster Mat. Servs. Corp., 83 NY2d 579, 589 (1994).

preventive maintenance and Repair of Cental Plaint HVAC Equipment." Unlike the situation before the Court of Appeals in Espinal, where the landlord retained the right to determine when the snow remover would salt the sidewalks, the defendant in this action had a comprehensive and exclusive machinery maintenance obligation as indicated by paragraph 11.18 of the service agreement which provides in pertinent part that "[t]he means and methods of performing the Services are solely the responsibility of the Contractor." Defendant does not show that the Bank interfered or supervised its repair/maintenance activities.

Furthermore, a contractor in New York is liable for injuries to third persons for negligent installation (Schiulaz v Arnell Constr. Corp., supra, 261 AD2d, at 248) or negligent inspection because the contractor assumes a duty to exercise reasonable care to prevent foreseeable harm to building's employees (Cassell v Babcock & Wilcox Co., 186 AD2d 1000, 1001 [4th Dept 19921). A contractor is also liable for common-law negligence for supplying defective equipment that is used by the employee of another contractor (Santangelo v Fluor Constructors Intern., Inc., 266 AD2d 893 [4th dept 19991; see, Greco v Archdiocese of New York, 268 AD2d 300, 301 [lst Dept 20001).

The deposition testimony indicates that RM# 3 did not operate properly and continued to suffer leaks despite defendant's numerous attempts to repair it.

The court has considered defendant's remaining arguments and finds that they are without meruit.

Accordingly, both the cause of action for negligence and that for violation of section 200 of the Labor Law are sustained and those branches of defendant's motion for summary judgment are denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing the cause of action for violation of section 240(1) of the Labor Law, this claim is hereby severed and dismissed; and it is further

ORDERED that the remaining branches of defendant's motion are denied and the remainder of the action continues; and it is further

ORDERED that the parties are directed to appear for a _____ conference on March 21, 2003, at 11 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: February 13 2003 ENTER:

PAULA J. OMANSKY
J.S.C.