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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE Justice

IA Part 5

VAUGHAN BROWN,

Plaintiff,

-against-

BRAUSE PLAZA LLC and STRUCTURE TONE, INC.,

Defendants.

Index Number 10787 2002

Motion Date January 27, 2004

Motion Cal. Numbers 2 & 3

BRAUSE PLAZA LLC,

Third Party Plaintiff,

-against-

METROPOLITAN LIFE INSURANCE COMPANY,

Third Party Defendant

STRUCTURE TONE, INC. and METROPOLITAN LIFE INSURANCE COMPANY,

Second Third Party Plaintiffs,

-against-

TISHMAN TECHNOLOGY CORP.,

Second Third Party Defendant.

Motion calendar numbers 2 and 3 are combined herein for disposition.

The following papers numbered 1 to 17 read on this motion by defendant/third-party plaintiff Brause Plaza LLC ("Brause") pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, or for summary judgment on its indemnification claim against third-party defendant Metropolitan Life Insurance Company ("Met Life"); and on this cross motion by defendant/second third-party plaintiff Structure Tone, Inc. ("Structure Tone") and Met Life pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims as asserted against Structure Tone, or to strike the note of issue and vacate the certificate of readiness as discovery remains outstanding.

The following papers numbered 18 to 29 read on this motion by second third-party defendant Tishman Technology Corp. ("Tishman") pursuant to CPLR 603, 1003 and 1010 to dismiss or sever the second third-party action, or to mark off or stay the trial of the second third-party action to conduct discovery.

	Papers Numbered	
Notice of Motion - Affidavits - Exhibits	1-4	18-21
Notice of Cross Motion - Affidavits - Exhibits ...	5-8	
Answering Affidavits - Exhibits	9-13	22-24
Reply Affidavits	14-17	25-29

Upon the foregoing papers it is ordered that the motions and cross motion are decided as follows.

This action arises out of injuries sustained by plaintiff on November 1, 2001 when he was allegedly caused to slip and fall in a stairwell in the building owned by Brause at 27-01 Bridge Plaza North in Queens (the "building"). On January 12, 2000, Brause's agent (not a party herein) hired Tishman as the construction manager to renovate the building into office space for future tenant occupancy. Brause's agent and Tishman hired subcontractors to perform the work.

On May 10, 2001, pursuant to a written agreement, Brause leased the building to Met Life. The lease contains provisions for Met Life to renovate the premises and authorized Met Life to hire contractors to perform the work. Thus, shortly, after the lease was signed, Met Life hired Structure Tone as the general contractor to renovate the leased office space. Structure Tone hired subcontractors, including plaintiff's employer, Pem Electric (not a party herein).

On the day of plaintiff's accident, the building was unoccupied except for construction workers and persons directly associated with the ongoing construction of the building. Plaintiff was working as an apprentice electrician on the fourth floor. At the time of his accident on the stairwell, plaintiff was leaving his work area for a lunch break. While descending the stairs, plaintiff alleges he stepped on construction debris and fell down the stairs to the landing below, sustaining serious injuries.

Plaintiff commenced this action against Brause and Structure Tone for common-law negligence and violations of Labor Law § 240, § 241(6) and § 200. In their respective answers, Brause and Structure Tone deny liability and each assert a cross claim against the other for indemnification and contribution. Brause also commenced a third-party action against Met Life for indemnification and contribution, prompting Met Life to assert a counterclaim against Brause for indemnification and contribution. Brause also asserts a claim against Met Life for breach of contract for failing to procure insurance. Thereafter, Met Life and Structure Tone commenced a second third-party action against Tishman for indemnification and contribution. The note of issue has been filed. The instant motions and cross motion ensued.

Brause and Structure Tone (hereinafter the "movants" when referred to collectively) each argue that plaintiff's accident was not due to an elevation-related risk. Rather, the movants maintain that plaintiff was simply descending the stairs when he fell and, thus, Labor Law § 240(1) does not apply.

The movants are entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) claim. The protections under Labor Law § 240(1) are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object which was improperly hoisted or inadequately secured (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Rocovich v Consolidated Edison Co., 78 NY2d 509). Here, plaintiff alleges that he slipped and fell on construction debris. As plaintiff's accident was not the result of an elevation-related hazard, Labor Law § 240(1) does not apply (see, Ross v Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v Consolidated Edison Co., supra; Melo v Consolidated Edison of N.Y., 246 AD2d 459, affd 92 NY2d 909; Charles v City of N.Y., 227 AD2d 429, lv denied 88 NY2d 815).

In any event, the stairway was not a tool used in the performance of the plaintiff's work, but rather a passageway used to get to and from his work site. "An accident arising on such a passageway does not lie within the purview of section 240(1)" (Ryan

v Morse Diesel, Inc., 98 AD2d 615, 616; see also, Norton v Park Plaza Owners Corp., 263 AD2d 531 [ruling that a permanent staircase is not designed as a safety device to protect against an elevation-related risk and thus not covered under § 240]). Instead, "[t]he appropriate statute is section 241, subdivision 6" (Ryan v Morse Diesel, Inc., supra, at 616). Consequently, plaintiff's Labor Law § 240(1) claim must be dismissed.

The movants each contend, however, that there is no basis to establish that any of the Industrial Code sections relied on by plaintiff to support his Labor Law § 241(6) claim were violated or that such violations were a proximate cause of his accident. Furthermore, the movants each contend that the subject accident did not occur in an area where construction was being performed, therefore, plaintiff is not entitled to the protections afforded under the statute. These arguments are without merit.

Courts have consistently held that a work site within the meaning of Labor Law § 241(6), as well as § 200, is not limited to the actual area where the construction work is to be performed, but includes adjacent areas that are part of the construction site, such as passageways to and from the work area (see, Kane v Coundorous, 293 AD2d 309; Mazzu v Benderson Dev. Co., 224 AD2d 1009; Higgins v E.I. du Pont de Nemours Co., 186 AD2d 1011; Brogan v International Bus. Mach. Corp., 157 AD2d 76). Moreover, as it is not disputed that at the time of the subject accident, the elevator was being used to carry materials and supplies and thus unavailable for plaintiff's use, the stairway qualifies as a "passageway" under the Labor Law statute (see, Holloway v Sacks & Sacks, Esqs., 275 AD2d 625, lv denied 95 NY2d 770; cf., Bruder v 979 Corp., 307 AD2d 980, lv denied 1 NY3d 502; Blysma v County of Saratoga, 296 AD2d 637). Hence, the accident area constituted part of the work site within the meaning of Labor Law §§ 241(6) and 200.

In order to demonstrate that an owner, general contractor or an agent thereof violated § 241(6), plaintiff is required to establish that a violation of an implementing regulation, which sets forth a "specific" standard of conduct, was the proximate cause of his injuries (Ross v Curtis-Palmer Hydro-Elec. Co., supra, at 501-502; Fair v 431 Fifth Ave. Assocs., 249 AD2d 262, 263; Vernieri v Empire Rlty. Co., 219 AD2d 593, 597). There also must be some factual basis from which a court can conclude that the regulation was in fact violated (see, Herman v St. John's Episcopal Hosp., 242 AD2d 316; Creamer v Amsterdam H.S., 241 AD2d 589). Furthermore, only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under this statutory section (see,

Heller v 83rd St. Investors Ltd. Partnership, 228 AD2d 371, lv denied 88 NY2d 815). Thus, to the extent plaintiff alleges violations of OSHA regulations, such allegations will not support his § 241(6) cause of action (see, id.; Ciraolo v Melville Court Assocs., 221 AD2d 582).

Plaintiff, however, also relies on several provisions of the Industrial Code, namely, 12 NYCRR § 23-1.5, § 23-1.7(e)(1) and (2), § 23-1.7(f) and § 23-1.15. The first of these provisions, § 23-1.5, contains general admonitions to employers to provide a safe workplace, and therefore, does not satisfy the specificity requirements to form a basis for a claim under § 241(6) (see, Ferreira v Unico Svc. Corp., 262 AD2d 524; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311; Vernieri v Empire Rlty. Co., supra). The latter provision, section 23-1.15, although sufficiently specific (see, Mazzu v Benderson Dev. Co., Inc., supra) governs safety rails and, thus, does not apply to the facts of this case. Plaintiff has not alleged that the lack of, or a defective handrail was a proximate cause of his fall.

Nevertheless, 12 NYCRR § 23-1.7(e)(1), which requires passageways to be kept free from accumulations of debris and other tripping hazards, § 23-1.7(e)(2), which requires areas where persons work or pass to be kept free from accumulations of debris, and § 23-1.7(f), which requires stairways or other safe means of access be provided to working levels above the ground, are applicable to the facts herein and set forth the specific standards of conduct required to support a Labor Law § 241(6) cause of action (see, O'Hare v City of N.Y., 280 AD2d 458; Betke v Archwood Estates, Inc., 261 AD2d 427; Akins v Baker, 247 AD2d 562; Adams v Glass Fab, Inc., 212 AD2d 972; Sergio v Benjolo N.V., 168 AD2d 235). The court notes, it is of no moment that plaintiff cited § 23-1.7(f) for the first time in his opposition papers (see, Pasquarello v Citicorp/Quotron, 251 AD2d 477; White v Farash Corp., 224 AD2d 978).

Also without merit is the contention of the movants that they are not liable because they had no actual or constructive notice of the alleged hazardous condition and a reasonable opportunity to cure it. "Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure is irrelevant to the imposition of Labor Law § 241(6) liability" (Rizzuto v Wenger Contr. Co., Inc., 91 NY2d 343, 352). Similarly, irrelevant is the argument that plaintiff was merely going to lunch and was not involved in any work activity at the time of the accident. Plaintiff was at the site for the purposes of performing

construction work within the meaning of Labor Law § 241(6) and 12 NYCRR § 23-1.4(b). Accordingly, the movants' are not entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim.

The movants also argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. In so arguing, each state that it did not direct, control or supervise the plaintiff's work.

Labor Law § 200 is the same as liability premised upon common-law negligence, as said statute merely codifies a landowner's common-law duty to provide laborers with a reasonably safe place to work (see, Lombardi v Stout, 80 NY2d 290; Jock v Fien, 80 NY2d 965; Allen v Cloutier Constr. Corp., 44 NY2d 290; Yong Ju Kim v Herbert Constr. Co., Inc., 275 AD2d 709). Liability based on theories of common-law negligence and breach of the general statutory duty to protect health and safety will attach to a landowner, contractor or an agent thereof who either created, or had actual or constructive notice of the unsafe condition which caused the accident, or exercised supervision and control over the injury-producing work (see, Lombardi v Stout, 80 NY2d 290; Shipkoski v Watch Case Factory Assocs., 292 AD2d 589; Akins v Baker, 247 AD2d 562; Yong Ju Kim v Herbert Constr. Co., Inc., supra).

Here, the Labor Law § 200 and common-law negligence claims are predicated upon a hazardous condition on the stairway, not upon the work plaintiff was assigned to perform. Therefore, the movants' arguments that they did not direct, control or supervise the plaintiff's work is superfluous.

Furthermore, the movants have failed to establish that they neither created the allegedly hazardous condition nor had actual or constructive notice of it. Therefore, summary judgment dismissing these claims is denied (see, Giovengo v P&L Mechanical, 286 AD2d 306; Steven v Alfredo, 277 AD2d 218; Yong Ju Kim v Herbert Constr. Co., Inc., supra; Goettelman v Indeck Energy Svcs. of Olean, Inc., 262 AD2d 958; see also, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851).

Additionally, although an out-of-possession owner generally is not liable for injuries resulting from the condition of the leased premises (see, Putnam v Stout, 38 NY2d 607), one who retains control of the premises or contracts to repair the property, may be liable for defects (see, Henness v Lusins, 229 AD2d 873). Here, it is not disputed that Brause retained control over certain areas of the building, and indeed, hired Tishman as the general contractor

to perform certain renovations, including renovations to the stairways in the building. Thus, there is a question of fact concerning Brause's liability for the allegedly hazardous condition of the stairway (see, Young v J.M. Moran Prop., Inc., 259 AD2d 1037; De Cristofaro v Joan Enters., 243 AD2d 1015).

The court also notes that during his deposition, plaintiff testified that a fellow employee was in the area when he fell and that construction workers were the only people in the building. Thus, in relying solely on plaintiff's testimony that he fell on construction debris but could not describe exactly what caused him to fall, the movants failed to meet their burden of eliminating any material issues of fact from the case (see, Schachat v Bell Atl. Corp., 282 AD2d 329; see also, Mott v Big V Supermarkets, Inc., 188 AD2d 870).

Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims remain viable.

Similarly, Brause is not entitled to summary judgment on its indemnification claim against Met Life. It is well-settled that an entity, not otherwise negligent but nevertheless held vicariously liable under the Labor Law, is entitled to common-law indemnification from that party which directed, supervised, or controlled the plaintiff's work (see, Kelly v Diesel Constr. Div., 35 NY2d 1; Kennelty v Darlind Constr., 260 AD2d 443; Charles v Eisenberg, 250 AD2d 801; Davis v Board of Trustees of the Hicksville Pub. Lib., 240 AD2d 461). To prevail on a common-law indemnification claim, however, the owner must have exercised no control over the work performed (Seecharran v 100 West 33rd St. Rlty. Corp., 198 AD2d 121; see also, Buccini v 1568 Broadway Assocs., 250 AD2d 466; Guillory v Nautilus Real Estate, 208 AD2d 236, appeal dismissed, lv denied 86 NY2d 881; Aragon v 233 West 21st St., Inc., 201 AD2d 353). Moreover, where more than one party might be responsible for an accident, summary judgment granting indemnification against one party is improper (see, Barabash v Farmingdale Union Free School Dist., 250 AD2d 794; Freeman v National Audubon Socy., 243 AD2d 608; see also, Edholm v Smithtown DiCanio Org., 217 AD2d 569).

In the instant case, it has not been established which entity had control over the area where plaintiff's accident occurred. Moreover, based on the deposition testimony submitted, many of the laborers used the subject stairway to access the work site, as well as to deliver materials and supplies to the work site. It has not been determined whether a laborer hired by Met Life's contractor, Structure Tone, a laborer hired by Brause or hired by Brause's contractor, Tishman, created the condition which allegedly caused

plaintiff's accident. Consequently, based on the evidence before the court, the "actor who caused the accident" cannot be determined (Freeman v National Audubon Socy., Inc., supra, at 609). Thus, it is premature at this juncture to reach the issue of common-law indemnification (see, id.; La Lamia v Epstein, 143 AD2d 886). Similarly, as it has not yet been determined that Brause's role in plaintiff's accident was passive, summary judgment against Met Life is not warranted on the contractual indemnification claim (cf., Davis v Board of Trustees of the Hicksville Pub. Lib., supra).

The cross motion and Tishman's motion is granted to the extent of striking the note of issue. Based upon the submissions herein, discovery was incomplete when the note of issue and certificate of readiness were filed (see, Aviles v 938 SCY Ltd., 283 AD2d 935).

To summarize, the motion by Brause is granted to the extent of severing and dismissing plaintiff's Labor Law § 240 claim. The cross motion by Structure Tone and Met Life is granted to the extent of severing and dismissing plaintiff's Labor Law § 240 claim and striking the note of issue. The motion by Tishman is granted to the extent of striking the note of issue.

Dated: May 13, 2004

J.S.C.