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

PRESENT: _____ PART _____

0116863/2001

DOLAN, PATRICK
VS
LASZLO TAUBER & ASSOCIATES

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 is decided per annexed decision

FILED
OCT 12 2004
CO.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/1/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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PATRICK DOLAN and TONI DOLAN,

Plaintiffs,

-against-

LAZSLO N. TAUBER & ASSOCIATES and LIBERTY CONTRACTING CORP.,

Defendants.

----------x

LAZSLO N. TAUBER & ASSOCIATES I, LLC, s/h/a LAZSLO N. TAUBER & ASSOCIATES,

Third-Party Plaintiff,

-against-

TIME INC., AOL TIME WARNER, INC. and TIME WARNER, INC.,

Third-Party Defendants.

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TIME INC., AOL TIME WARNER, INC. and TIME WARNER, INC.,

Fourth-Party Plaintiffs,

-against-

HENEGAN CONSTRUCTION CO., INC.,

Fourth-Party Defendant,

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Index No.
116863/01

Motion Sequence Nos.
002, 003, & 004

Third-Party Index No.
590917/02

Fourth-Party Index No.
590425/03

MARILYN SHAFER, J.:

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence 002, defendant Liberty Contracting Corp. (Liberty) moves for summary judgment (CPLR 3212) dismissing the complaint. In motion sequence 003, defendant/third-party plaintiff Lazslo N. Tauber & Associates I, LLC, s/h/a Lazslo N. Tauber & Associates (Tauber) moves for summary judgment (CPLR 3212) dismissing plaintiffs' complaint. In motion sequence 004, third-party defendants/fourth-party plaintiffs Time Inc. (Time), AOL Time Warner (AOL), and Time Warner Inc. (Time Warner) seek (1) summary judgment (CPLR 3212) dismissing the third-party complaint; (2) summary judgment (CPLR 3212) on their fourth-party complaint; and (3) an assessment of costs and attorney fees as against fourth-party defendant Henegan Construction Co., Inc. (Henegan).

Factual Background

In this action, plaintiffs seek to recover monetary damages as the result of Patrick Dolan's (Dolan) February 5, 2000 construction accident. Plaintiffs seek recovery under the theories of common-law negligence and violations of Labor Law § 200, 240 (1), 241 (6), and 241-a.[1] According to plaintiffs, on the date of the accident, Dolan, a laborer in the employ of

[1] Plaintiffs have been granted leave to voluntarily discontinue plaintiffs' loss of services claim on behalf of Toni Dolan.

fourth-party defendant Henegan, was working on a construction site on the third floor at 135 W. 50th Street, New York, New York. At approximately 10:00 am on February 5, 2000, Dolan injured his back pushing a mini-container of construction debris up a wooden ramp. Plaintiffs allege that the mini-container was defective, in that at least one of the wheels locked up while Dolan was pushing the mini-container up the ramp. According to Dolan, he immediately had a fellow laborer Joe Wyndham (Wyndham) push the mini-container up the ramp for him.

Discussion

The movants in motion sequence 002 and 003 each seek summary judgment dismissing plaintiffs' complaint; in motion sequence 004, third-party defendants move for summary judgment dismissing the third-party complaint's prayer for indemnification and costs and fees. To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See, Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See, Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Common-Law Negligence and Labor Law § 200

Liberty and Tauber first seek dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims. To establish a prima facie case of common-law negligence, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the proximate cause of the injury. See, Pouso v City of New York, 177 AD2d 560 (2d Dept 1991). "In order to make out a valid common-law negligence claim against an owner [or general contractor] in the context of a Labor Law case, there must be evidence that the owner exercised control and supervision over the plaintiff's work, or had actual or constructive notice of an injury-causing unsafe condition." Surico v City of New York, 4 Misc 3d 1014, ___, 2004 WL 1829551, 4* [Sup Ct, Kings County 2004]).

An owner or general contractor's common-law duty to maintain a safe workplace under the common-law is codified in Labor Law § 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963). To be charged with liability under Labor Law § 200, the defendant must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]), or have actual or constructive notice of the unsafe condition causing the accident (see Higgins v 1790 Broadway Associates, 261

AD2d 223 [1st Dept 1999]; see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 [1st Dept], lv denied 85 NY2d 811 [1995]).

Because plaintiffs do not contend that either Liberty, the owner of the mini-containers, or Tauber, the owner of the building in which Dolan worked, supervised Dolan, liability under either common-law negligence or Labor Law § 200 theory must rest upon those defendants having notice, either actual or constructive, of any alleged dangerous condition.[2]

Plaintiff has proffered no evidence that either Tauber or Liberty had actual notice of a problem with the wheels of the mini-cart. Liberty does admit that it owned mini-containers and leased many to Dolan's employer, Henegan, for use in the cleanup of the construction site at which Dolan was injured. See Iacobazzo Examination Before Trial (EBT), at 24-33. Additionally, Dolan testified that the word "Liberty" was printed on the side of the mini-container which he allege had defective wheels. See Dolan EBT, at 50. Finally, Liberty admits that it checked the mini-containers for problems when Liberty regularly picked up debris from Henegan and dumped it (See Iacobazzo EBT,

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[2] Plaintiffs assert that, irrespective of notice requirements, Liberty had a duty to provide Dolan with safe equipment, and the failure to do serves as the predicate for liability under the common-law and Labor Law § 200, it only serves as the basis for liability under Labor Law § 241 (6). See Leon v J & M Peppe Realty Corp., 190 AD2d 400 (1st Dept 1993).

at 58). But Liberty was unaware of any wheel problems with the mini-containers; nor had Liberty heard any complaints about the wheels of the mini-containers at the time of Dolan's accident. See Iacobazzo EBT, at 61.

Additionally, Tauber, the building owner, was not actively involved with the construction site and was unaware that the mini-containers even existed. See Breschard EBT, at 28-32.

Therefore, this court holds, as a matter of law, that neither Liberty or Tauber had actual notice of any problem with the wheels of the mini-container.

"To constitute constructive notice, a defect must be visible and apparent[,] and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). Constructive notice "must be of the specific condition and of its specific location." Canning v Barney's New York, 289 AD2d 32, 33 (1st Dept 2001).

Plaintiffs have not proffered any evidence to show that the wheel problem was known to anyone prior to Dolan's accident, or could readily be seen. This is fatal to any such claim. Therefore, defendants are entitled to dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims.

Labor Law 240 (1) and 241-a Claims

Liberty and Tauber additionally seek dismissal of

plaintiffs' Labor Law 240 (1) and 241-a claims. Neither of these statutes apply to the facts of Dolan's accident.

Under Labor Law § 240 (1), owners, general contractors, and construction managers who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See, Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991); see also Rizzo v. Hellman Elec. Corp, 281 AD2d 258 (1st Dept 2001). However, the extraordinary protections of Labor Law § 240(1) apply only to a narrow class of dangers, i.e., where the hazards are related to gravity's effects, "where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich v Consolidated Edison Co., supra, at 514; see also, Groves v Land's End Housing Co., Inc., 80 NY2d 978 (1992). There is no evidence that Dolan's accident was caused by a height differential. Therefore, all of plaintiffs' Labor Law § 240 (1) claims are dismissed as to defendants.

Similarly, Labor Law § 241-a is inapplicable to this action. That section requires that workers situated in elevator

shaftways, hatchways, and stairwells "in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such [persons]." Dolan does not contend that he was working in any of an elevator shaftway, hatchway, or stairwell. Therefore, all of plaintiffs' Labor Law § 241-a claims are also dismissed.

Labor Law § 241 (6) Claims

Finally, defendants seek to dismiss plaintiffs' Labor Law § 241 (6) claim, which, according to the verified Bill of Particulars, is predicated upon violations of Industrial Code sections 12 NYCRR 23-1.5 (a), (c) and 12 NYCRR 23-1.28 (a), (b).

Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The section requires owners and contractors at a construction site to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." Ross v Curtis-Palmer Hydro-Electric Co., supra, 81 NY2d, at 502.

Because "[o]nly a violation of the State Industrial Code and

regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under that statutory section" (Heller v 83rd Street Investors Ltd. Partnership, 228 AD2d 371, 372 [1st Dept], lv denied 88 NY2d 815 [1996]; see also Messina v City of New York, 300 AD2d 121 [1st Dept 2002]), plaintiffs are required to set forth any sections of the Industrial Code that they contend are predicates for liability.

General provisions of the Industrial Code, which do not mandate compliance with concrete specifications, are insufficient to support claims under Labor Law § 241 (6). See Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, supra; see also Hawkins v City of New York, 275 AD2d 634 (1st Dept 2000). Therefore, this court must examine each section of the Industrial Code that plaintiffs allege was violated to determine whether it may serve as a basis for Labor Law § 241 (6) liability.

12 NYCRR 23-1.5 sets forth the general responsibilities of employers, including (a), the health and safety protection required, and (c) the condition of the equipment used and safeguards. That section, which requires "'reasonable and adequate' protection and that machinery be in 'good repair' and 'safe,' [require only] generic directives that are insufficient as predicates for section 241 (6) liability." Maldonado v Townsend Ave. Enterprises, 294 AD2d 207 (1st Dept 2002).

Additionally, 12 NYCRR 23-1.28 (a) is not sufficiently

specific to serve as a predicate for liability under Labor Law § 241 (6). See Wegner v State Street Bank & Trust Co. of Connecticut Nat. Ass'n, 298 AD2d 211 (1st Dept 2002). However, 12 NYCRR 23-1.28 (b), which provides, in pertinent part, that "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicle," contains a sufficiently specific standard of conduct to serve as the basis of a Labor Law § 241 (6) claim. See Freitas v New York City Transit Authority, 249 AD2d 184 (1st Dept 1998). This regulation goes to the heart of the issues in the instant action, because the testimony of Dolan's co-worker, Wyndham, conflicts with Dolan as to the condition of the wheels in question.

Finally, because liability under Labor Law § 241 (6) is not delegable (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]), Tauber cannot successfully assert the defense of lack of control of plaintiff's worksite to avoid liability.

Because triable questions of fact exist as to whether defendants complied with the concrete code specification of 12 NYCRR 23-1.28 (b), those portions of defendants' motions for summary judgment dismissing plaintiffs' claims of a violation of Labor Law § 241 (6) is denied.

Third-Party Defendant's/Fourth-Party Plaintiff's Motion

Third-party defendants/fourth-party plaintiffs Time, AOL, and Time Warner seek (1) summary judgment (CPLR 3212) dismissing

the third-party complaint; (2) summary judgment (CPLR 3212) on their fourth-party complaint; and (3) an assessment of costs and attorney fees as against fourth-party defendant Henegan Construction Co., Inc. (Henegan). In a stipulation of settlement dated May 13, 2004, Henegan has agreed to assume the defense and to indemnify Time, AOL, and Time Warner in the instant action. Additionally, Henegan had agreed to pay 50% of the previous total defense costs and legal fees, including disbursements expended in the defense of Time, AOL, and Time Warner in this action. Therefore, that portion of Time, AOL, and Time Warner's motion that seeks summary judgment on their fourth-party complaint, as well as costs and fees is denied as moot.

Finally, Time, AOL, and Time Warner have failed to proffer a copy of the third-party complaint in its papers. Therefore, this court cannot address that portion of the third-party defendant/fourth-party plaintiff's motion that seeks summary judgment dismissing the complaint.

Accordingly, it is hereby

ORDERED that defendant Liberty Contracting Corp.'s motion for summary judgment dismissing the complaint is granted only to the extent of dismissing plaintiff's common-law negligence, and Labor Law §§ 200, 240(1), 241-a claims, and is otherwise denied; and it is further

ORDERED that defendant Lazslo N. Tauber & Associates motion

for summary judgment dismissing the complaint is granted only to the extent of dismissing plaintiff's common-law negligence, and Labor Law §§ 200, 240(1), 241-a claims, and is otherwise denied; it is further

ORDERED that third-party defendant/fourth-party plaintiff's motion for summary judgment and for an assessment of costs and attorney's fees is denied.

10/1/04

MARILYN SHAFER
J.S.C.

FILED
OCT 12 2004
COUNTY CLERK'S OFFICE