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

PRESENT: LOUIS B. YORK Justice PART 2

Smith

- v -

Reno

INDEX NO. 115216-01

MOTION DATE

MOTION SEQ. NO. 02

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

FILED
APR 18 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/6/05

Levy
LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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DOUGLAS P. SMITH,

Plaintiff,

Index No.
115216/01

-against-

Motion Sequence No.
002

HINES GS PROPERTIES, INC., FDA QUEENS L.P., JOHN SMITH (name being Fictitious as General Partners) and TURNER CONSTRUCTION COMPANY,

Defendants.

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HINES GS PROPERTIES, INC., FDA QUEENS L.P., and TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

Index No.
59072/02

-against-

KOEHLER MASONRY CORP. and LIBERTY MECHANICAL COMPANY,

Third-Party Defendants.

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LOUIS B. YORK, J.:

In this action to recover monetary damages as the result of a workplace accident, defendants/third-party plaintiffs Hines GS Properties, Inc. (Hines), FDA Queens L.P. (FDA), John Smith (Smith), and Turner Construction Company (Turner) move for summary judgment (CPLR 3212) dismissing the complaint. Additionally, defendants/third-party plaintiffs seek summary

judgment on their claims for contractual indemnification and attorney's fees as against third-party defendants Koehler Masonry Corp. (Koehler) and Liberty Mechanical Co. (Liberty). Third-party defendant Koehler cross-moves for summary judgment dismissing the third-party complaint. For the reasons stated below, defendants' motion for summary judgment dismissing the complaint is granted, only to the extent of dismissing those causes of action that assert claims under Labor Law §§ 240,(1), and 241 (6) and 241-a, and is otherwise denied; and Koehler's cross motion is denied.

Background

Plaintiff, a plumber in the employ of third-party defendant Liberty, alleges that on June 8, 1999, he tripped and fell on construction-site bricks, lumber, and debris in a walkway adjacent to the FDA Building located at 158-15 Liberty Avenue, Jamaica, New York. According to plaintiff, his fall caused injuries to his ankle, and plaintiff's resulting inability to work has caused psychological damage.[1] He seeks monetary recovery of damages based upon common-law negligence, as well as Labor Law §§ 200, 240 (1), 241-a, and 241 (6) theories of liability, as against FDA Queens, L.P., (FDA) owner of the property, Hines GS Properties (Hines), development manager of the

[1] According to plaintiff, he has been diagnosed as "bipolar, trauma related." See Plaintiff Examination Before Trial, at 156.

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construction project and property manager of the building, and Turner Construction (Turner), the general contractor on the project.

Defendants FDA, Hines, and Turner seek recovery of monetary damages from Koehler, the masonry subcontractor on the construction project, and plaintiff's employer, Liberty, based upon theories of common-law and contractual indemnification, breach of contract in failing to procure insurance, as well as its contractual obligation to reimburse third-party plaintiffs for attorneys fees and legal costs.

Discussion

To obtain summary judgment, a movant must establish entitlement to a 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

FDA, Hines and Turner seek dismissal of plaintiff's common-law negligence and Labor Law § 200 claims.

Labor Law §200, which requires an employer to maintain a

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safe place to work is a codification of common-law negligence (Comes v New York State Electric & Gas Corp., 82 NY2d 876, [1993]).

Where, as here, the dangerous condition is created by a contractor who left tools and debris about, an owner or general contractor or anyone else who exercises supervision or control over the activity that caused the injury can be held liable (Candela v City of New York, 8AD 3rd 45, 47 [1st Dept 2004]). Of course, the possibility that the dangerous condition may cause injury must be reasonable (See, North Congregation of Jehovah's Witnesses, 132 AD2d 313)[3rd Dept 1987]). Here, the prospect that tools and debris randomly strewn about at a busy worksite satisfies foreseeability. In addition, defendants must have had actual or constructive notice of the condition (Chaney v New York City Transit Authority, 12 AD2d 61, [1st Dept 1960]), affd 10 NY2d 871 [1961]; Karian v Anchor Motor Freight, Inc., 144 AD2d 777 [3rd Dept 1988]).

Jeff Spiritos [redacted] was produced by defendant Hines for its deposition. He testified that he had been to the site many times, usually on a weekly basis and had asked Turner to "keep the site tidy." Turner had responded that "they would take action to address the concern. During his deposition, Spiritos read from a meeting reports that stated "site cleanup Job Site atrocious." In his own EBT, plaintiff testified that the bricks

and debris strewn about the area where he fell had been there for months.

The foregoing raises strong possibilities of actual notice by virtue of Spiritos' testimony whom defendant Hines produced for the EBT and possibilities of actual notice to FDA, the owner of the property. FDA hired Hines as its Development Manager and Hines might even be determined to be its agent. But beyond that, the duration of the condition as testified to by plaitiff could establish constructive notice. Sufficient issues of fact on the notice issue militate against summary judgment dismissing the Section 200 and common-law negligence claims against Hines, the Development Manager and FDA, the owner.

Steven Boyce (Boyce)testified on behalf of Turner, the general contractor at the construction site. In his capacity as Turner's superintendent, Boyce was on the construction site daily. He testified that he personally recalled that the masonry contractor, Koehler, kept the site in an unkempt manner. Additionally, Boyce testified that it was his responsibility to report unsafe conditions on the job site. There remain questions as to whether such a responsibility carried with it the burden as the general contractor to see that the subcontractor, Koehler, remedied the situation (See, Tilkins v Niagra Falls, 52 AD2d 306 [4th Dept 1976]); (owners and general contractors are responsible for the ways and approaches to the worksite); Accord Chaney v NYC

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Transit Auth., 12 AD2d 61 [1st Dept 1960]), affd 10 NY2d 871 [1961]; See, also, Bush v Gregory/Madison Ave., 308 AD2d 360 [1st Dept 2003]) [Responsibility for safety coordination with ability to stop work if dangerous condition arose sufficient to satisfy control.].

Labor Law 240 (1) and 241-a Claims

FDA, Hines, and Turner additionally seek dismissal of plaintiff's Labor Law 240 (1) and 241-a claims. Neither of these statutes apply to the facts of plaintiff'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

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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).

Plaintiff allegedly tripped over bricks, lumber, and debris in a small mound on his walking path. That hazard was within the usual and ordinary dangers of a construction site and not caused by a height differential requiring the use of a protective safety device, as contemplated by the statute. See Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914 (1999); see also Thompson v St. Charles Condominiums, 303 AD2d 152 (1st Dept 2003). Therefore, plaintiff's Labor Law § 240 (1) claims are dismissed as to all 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]." "The point of the [required] planking is to protect the construction [or demolition] worker either from falling through the shaft for more than one story ... or from falling debris or other materials during construction." Nevins v Essex Owners, Corp., 259 AD2d 384, 385 (1st Dept 1999). However, plaintiff does not contend that he was working in any of an elevator

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shaftway, hatchway, or stairwell. Therefore, all of plaintiff's Labor Law § 241-a claims are also dismissed.

Labor Law § 241 (6) Claims

Finally, defendants seek to dismiss plaintiff's Labor Law § 241 (6) claim, which, according to plaintiff is predicated upon violations of two OSHA sections, and Industrial Code sections 12 NYCRR 23-1.2 (a), 12 NYCRR 23-1.5 (a), and 12 NYCRR 23-1.7 (e), (1) and (2).

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 494, 502 (1993).

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

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City of New York, 300 AD2d 121 [1st Dept 2002]), alleged violations of OSHA Regulations cannot serve as a predicate to liability under Labor Law § 241 (6). See Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998).

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., supra; see also Hawkins v City of New York, 275 AD2d 634 (1st Dept 2000).

12 NYCRR 23-1.2 is a section of the Labor Rules and Regulations that is entitled "Findings of Fact." It has previously been held to lack concrete specifications with which a defendant must comply to impose a duty under Labor Law § 241 (6). See, Schiulaz v Arnell Const. Corp., 261 AD2d 247 (1st Dept 1999).

12 NYCRR 23-1.5 sets forth the general responsibilities of employers, including (a), the health and safety protection required, and (b) 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

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Townsend Ave. Enterprises, 294 AD2d 207 (1st Dept 2002).

Industrial Code section 12 NYCRR 23-1.7 (e), (1) and (2) has previously been held to be sufficiently specific to support a Labor Law § 241 (6) claim. See Farina v Plaza Const. Co., Inc., 238 AD2d 158 (1st Dept 1997). Section 12 NYCRR 23-1.7 (e) provides:

> (E) Tripping and Other Hazards:
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Section 23 NYCRR 1.7 (e) does not apply to the instant action, as plaintiff was injured outside, in an open area between buildings, and not in a "passageway," "walkway," or "working area" within the meaning of that section of the Industrial Code. See Jennings v Lefcon Partnership, 250 AD2d 388 (1st Dept 1998), lv denied 92 NY2d 819 (1999); see also Lenard v 1251 Americas Assocs, 241 AD2d 391 (1st Dept 1997).

Therefore, that portion of defendants' motion that seeks to dismiss all of plaintiff's Labor Law § 241 (6) claims is granted.

Indemnification

Defendants FDA, Hines, and Turner finally seek an order

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stating that they are entitled to contractual indemnification, as well as attorney's fees as against third-party defendants Koehler and Liberty.

This court has dismissed any causes of action as against FDA, Hines, and Turner that would impute vicarious liability to those defendants. Because General Obligations Law § 5-322.1 voids any agreement relative to construction work "purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee," these defendants cannot and will not be indemnified under a contract for their own negligence.

However, in the event any or all of FDA, Hines and Turner are found not to be liable for plaintiff's injuries, Turner's contract with Liberty contains a clause that provides indemnification to "Turner and the Owner" for all attorney's fees and legal costs and disbursements. See "Liability for Damage and Personal Injury" Clause, March 9, 1998 Contract, Exhibit H, Notice of Motion. Turner's contract with Koehler contains the same clause. See "Liability for Damage and Personal Injury" Clause, June 4, 1998 Contract, Exhibit I, Notice of Motion.

Because, therefore, it is unclear whether or not FDA, Hines and/or Turner were wrongdoers, their motion for contractual

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indemnification and attorney's fees is denied as premature. See, Sheehan v. Fordham University, 259 AD2d 328 (1st Dept 1999); see also Jarvis v Crotona Associates, LLC, 14 AD3d 423 (1st Dept 2005).

Koehler's Cross Motion

Koehler seeks summary judgment dismissing the third-party complaint. For the reasons stated below, this cross motion is denied.

Plaintiff and Turner have each testified that Koehler did not keep the worksite in a clean condition. See Plaintiff EBT, at 65-67; Boyce EBT, at 49. Although Koehler has proffered daily construction reports to show it was not on the site on the date of plaintiff's alleged accident (see Exhibit A, Notice of Cross Motion), there is a question of fact as to whether Koehler caused the alleged dangerous condition that plaintiff asserts he tripped on sometime before that date. Although Koehler contends that it was required to leave some bricks on the premises when it left the site, it is a question of fact whether it was bricks that Koehler left for Turner's use or a failure to clean up its worksite that led to the alleged dangerous condition. Therefore, that part of Koehler's cross motion that seeks dismissal of third-party plaintiffs' common-law and contractual indemnification claims is denied.

Koehler additionally seeks to dismiss that cause of action

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that alleges that Koehler breached its contract with the third-party plaintiffs by failing to procure the appropriate insurance. However, Koehler has failed to provide a copy of any of the policies of insurance it claims to have had in force during the construction. Therefore, that portion of Koehler's cross motion that seeks to dismiss the third-party plaintiffs' claim for failure to procure insurance is denied.

Finally, Koehler's motion to dismiss the causes of action to reimburse third-party plaintiffs for attorneys fees and costs is denied as premature, in that any such obligation to reimburse it cannot be addressed until liability is determined.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, only to the extent of dismissing those causes of action that assert claims under Labor Law §§ 240 (1), 241-a and 241 (6), and is otherwise denied; and it is further

ORDERED that third-party defendant Koehler Masonry Corp.'s cross motion is denied.

Dated: April 6, 2005

Enter:

FILED

APR 18 2005

NEW YORK
COUNTY CLERK'S OFFICE

Louis B. York, J.S.C.

LOUIS B. YORK