SHORT FORM ORDER

INDEX No. 03-11371
CAL. No. 06-01260-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-31-06
ADJ. DATE 12-19-06
Mot. Seq. # 001 - MD

WILLIAM McGEEVER,	:	STANTON & GUZMAN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	585 Stewart Avenue, Suite 410
	:	Garden City, New York 11530
- against -	:	
	:	
	:	WHITE, QUINLAN & STALEY, LLP
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Defendant.	:	Garden City, New York 11530

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motions and supporting papers___; Answering Affidavits and supporting papers 13- 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint is denied.

Plaintiff commenced this action to recover damages, pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence for injuries he sustained in a fall at a renovation site on December 16, 2002. Defendant was the general contractor hired by SUNY Farmingdale to perform certain renovations at its campus. One of the renovations involved installation of an elevator to provide handicap access to the balcony area of a two-story science lab. In the course of the renovation, several heaters, which were suspended from the ceiling, had been disconnected and relocated. Also during the installation of the elevator, part of the railing for the balcony had been removed.[1]

[1] Plaintiff testified that Hutton was involved in the wiring of the elevator but not its installation, and that it was workers from SUNY Farmingdale who removed the railing sections.

Plaintiff, a union electrician, was employed by non-party Hutton Electric, the electrical subcontractor hired by defendant. Plaintiff testified at his examination before trial that on the day of his accident he was a foreman for Hutton. He was directing the electricians in their task of reconnecting the electric to the suspended heaters. Although he had been in the science lab a few times before, he had never been on the balcony before that day.[2] Plaintiff was on the balcony, near to the elevator, and was walking backwards while giving directives as to the heaters. He was leaning over the railing, which was at his waist, pointing to the heaters. After one directive, he continued walking backwards and expected that the railing would again meet him at his waist. However, this section of the railing had been removed and as he leaned over to point, he felt a caution tape snap, and he fell off the balcony. Plaintiff stated that prior to his fall he was unaware that this section of the railing had been removed.

Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 490-491, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). The statute is designed to protect workers from gravity-related hazards such as falling from a height (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501), and must be liberally construed to accomplish the purpose for which it was framed (*see,* ***Rocovich v Consolidated Edison Co.***, supra at 513). Here, the Court concludes that defendant failed to establish that plaintiff's fall from the balcony to the floor below, in the absence of any safety device which would have prevented his fall, was not the kind of gravity-related hazard the statute was designed to address (*see*, ***Valensisi v Greens at Half Hollow, LLC,*** 33 AD3d 693, 695, 823 NYS2d 416 [2006]; ***Brandl v Ram Builders, Inc.,*** 7 AD3d 655, 655-656, 777 NYS2d 511 [2004]; ***Laquidara v HRH Constr. Corp.***, 283 AD2d 169, 724 NYS2d 53 [2001]; ***Iannelli v Olympia & York Battery Park Co.,*** 190 AD2d 775, 593 NYS2d 553 [1993]).

The Court finds unavailing defendant's argument that plaintiff was not engaged in renovation work at the time of his accident, only directing what work was to be performed, and that the actual work on the suspended heaters was performed with a ladder or a scissor lift. Unlike the case relied upon by defendant, plaintiff's job as the electrical foreman was to direct the work performed on the suspended heaters (*compare*, ***Plotnick v Wok's Kitchen Inc.***, 21 AD3d 358, 800 NYS2d 37 [2005]).[3]

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[2] Plaintiff testified that normally he entered the room from the first floor door. However, on this day the key for the door, which was in the possession of FPF's employee, was not available and he was forced to enter from the second story.

[3] In ***Plotnick*** the injured plaintiff was performing roofing work and went into the building when its owner asked him to ascertain whether a ceiling space heater should be removed. As he was looking upward at the heater he fell into an unguarded stairwell. There, the Court reasoned that the work in which the plaintiff was involved at the time of his fall was wholly unrelated to an elevation-related hazard. However, here plaintiff was the electrical foreman charged with reconnecting the ceiling heaters.

Accordingly, summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action is denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, the Court finds that FPF has not established, prima facie, that it had no notice of the hazardous condition that plaintiff alleges caused his accident (***Sang Hyun Ban v Sunjin Shipping USA, Inc.***, 23 AD3d 452, 805 NYS2d 620 [2005]). Accordingly, summary judgment is also denied as to plaintiff's Labor Law § 200 and common-law negligence causes of action.

Labor Law § 241(6) requires owners and general contractors 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. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (*see*, ***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra;* ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

The Court is troubled by the fact that plaintiff did not offer which sections of the Industrial Code were violated by defendant prior to his opposition to defendant's motion, despite two "So Ordered" stipulations wherein he agreed to supply same. Further, plaintiff has not sought leave to serve an amended bill of particulars asserting the specific Industrial Code violations. Nevertheless, in the absence of unfair surprise or prejudice to defendant (***Ellis v J.M.G., Inc.,*** 31 AD3d 1220, 1121, 818 NYS2d 724 [2006]; ***Walker v Metro-North Commuter R.R.,*** 11 AD3d 339, 783 NYS2d 362 [2004]), the Court, on its own motion, deems so much of the opposition which introduced the specific Industrial Code violations as seeking leave to serve an amended bill of particulars asserting same.

Plaintiff's opposition relies upon defendant's alleged violation of the Industrial Code at 12 NYCRR § 23-1.7(b)(1), entitled, "Hazardous openings" which provides:

> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Subsection (iii), dealing with safety devices required when an employee is required to work close to the edge of such an opening, is clearly inapplicable to the instant scenario. However, subsection (i) (above) is applicable to the instant scenario and is sufficiently specific to form a predicate for defendant's potential § 241(6) liability (***Ellis v J.M.G., Inc.,*** *supra*).

Plaintiff's opposition also asserts an alleged violation of the Industrial Code at 12 NYCRR § 23-1.15, entitled, "Safety railing" which provides that "whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows." Subsection (a) through (e) provide the construction requirements. However, section 23-1.15 does not direct when a safety railing should by used, it sets forth standards for its construction, and it is undisputed that the railing had been removed and no safety railing installed. Therefore, section 23-1.15 is inapplicable to the facts herein (***Partridge v Waterloo Cent. School Dist.,*** 12 AD3d 1054, 1056, 784 NYS2d 767 [2004]).

Therefore, summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is denied and plaintiff is granted leave to serve an amended bill of particulars asserting a violation of 12 NYCRR § 23-1.7(b)(1)(i) within thirty (30) days of the date of this order with notice of entry. The Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (*see*, ***Rizzuto v L. A. Wenger Contr. Co.,*** *supra*; ***Herman v St. John's Episcopal Hosp.,*** 242 AD2d 316, 678 NYS2d 635 [1997]).

Dated: MAR 05 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**