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

PRESENT: HON. LELAND DEGRASSE PART 25

Index Number : 126579/2002

FLANAGAN, ROBERT

VS

AUSTIN BROTHERS, INC.

Sequence Number : 008

SUMMARY JUDGMENT

INDEX NO. 126579/02

MOTION DATE 10/10/06

MOTION SEQ. NO. 008

MOTION CAL. NO. 44

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 [X] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MAR 07 2007

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

Dated: _____

_____ J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

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ROBERT FLANAGAN and TRISEVGENI FLANAGAN, :

Index No.: 126579/2002

Plaintiffs, :

Cal. No. 44 of 10/10/06

-against- :

:

AUSTIN BROTHERS, INC. and MOODY'S HOLDINGS, INC., :

Defendants. :

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DeGRASSE, J.:

Motion sequence nos. 08 and 09 are consolidated. In this personal injury action arising from a workplace accident, defendant Austin Bros., Inc. ("ABI") moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claims for common-law negligence and violations of Labor Law §§ 200, 240 (1) and § 241 (6). Moody's Holdings Inc. ("MHI") moves for the same relief. In the alternative, MHI moves pursuant to CPLR 3212, for conditional summary judgment against ABI for contractual and/or common law indemnification.

FACTS

Plaintiff, Robert Flanagan, an electrician, was injured on November 15, 2000, while performing renovation work at office space owned and occupied by MHI and located at 99 Church Street in Manhattan. MHI had hired ABI as its general contractor on the renovation project. At the time of the accident, plaintiff was employed as a foreman for non-party C.W. Greene ("CWG") who had been hired by ABI to perform the electrical work.

At his deposition, plaintiff testified that the work site was located in the conference room on the 11th floor of the subject premises. On the date of the accident there was "garbage" on the conference room floor which consisted of dust, removed ceiling tiles, black iron clips and pencil rods that were used to secure the tiles to the ceiling, pieces of sheet rock, and carpeting that had been removed from the floor. There was also "a lot of stuff" in the conference room which consisted of a concierge table that was taped up for reuse, two plaster columns about eight-feet long that were going to be cut up and reused, two air conditioning/heating units that were going to be placed in the ceiling, and several gang boxes in which the workers' tools and equipment were stored. At the time of the accident, plaintiff was attempting to walk across the conference room floor to retrieve some blueprints from his gang box. Plaintiff did not have a clear path in which to walk and cautiously side stepped over a six-inch pile of demolition debris made up of black iron clips, pencil rods and pieces of sheet rock. As plaintiff attempted to place his left foot in a clear area on the other side of the debris, it slid out from under him causing his knee to twist. Plaintiff slipped, but did not fall to the ground. Plaintiff did not see what caused him to slip either before or after the accident. Plaintiff claims that it was "dirt, debris, and other refuse in the immediate work area" which caused his slip. Plaintiff further claims that approximately ten minutes before the incident, while standing by one of the entrances to the conference room, he asked Robert Dunlevy, ABI's superintendent, "to get the stuff out of the room in order for [him] to complete [his] job." Plaintiff's near fall allegedly resulted in serious injuries to his left knee.

On December 10, 2002, plaintiff and his wife, derivatively, commenced the instant action against defendants asserting common-law negligence and Labor Law §§ 200, 240 (1) and § 241 (6) claims.

DISCUSSION

Summary Judgment Standard

The function of the court on a motion for summary judgment is "[i]ssue-finding, not issue determination" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1989]). Thus, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure of the movant to make the required showing mandates a denial of the motion regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). Moreover, it is well settled that summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). On the other hand, to defeat a motion for summary judgment the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of any material question of fact (Friends, 46 NY2d at 1067-1068; *Zuckerman* 49 NY2d at 562). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Torres v Jeremias*, 283 AD2d 484, 484 [2001]).

Plaintiffs' Labor Law §240(1) Claim

Plaintiffs do not argue against dismissal of their Labor Law § 240 (1) claim. It is clear from the facts adduced that plaintiff's injury was not caused by an elevation-related risk that calls for any

of the protective devices of the types listed in Labor Law § 240 (1) (*see Gaul v Motorola,* Inc., 216 AD2d 879 [1995]; *Bond v York Hunter Constr.*, 95 NY2d 883 [2000]; *Piccuillo v Bank of New York Co., Inc.*, 277 AD2d 93 [2000]). Accordingly, defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 240 (1) cause of action is granted.

Plaintiffs' Labor Law §241(6) Claim

Labor Law § 241 (6) places a nondelegable duty on owners and contractors, without regard to direction and control, to keep worksites safe for those employed at such places (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 503 [1993]; *DeSilva v Jantron Indus.,* 155 AD2d 510 [1989]). To sustain a cause of action under the statute a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a section of the Industrial Code that is applicable given the circumstances of the accident, and "that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (*Samiani v New York State Elec. & Gas* Corp., 199 AD2d 796, 797 [1993], citing *Ross* at 502-504).

Defendants seek dismissal of plaintiffs' Labor Law § 241 (6) cause of action based on the ground that plaintiffs have failed to allege a violation of a concrete specification of the Industrial Code in support of their claim. In opposition, plaintiffs now limit their claims to Industrial Code violations 12 NYCRR 23-1.7 (d) and (e) (2). The first regulation on which plaintiffs rely, Industrial Code 23-1.7 (d), entitled "slipping hazards," prohibits employers from allowing employees to use a "floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires employers to remove sand or cover "[i]ce, snow, water, grease and any other foreign substances which may cause slippery footing." The second regulation on which

plaintiffs rely, 12 NYCRR 23-1.7 (e) (2), entitled "tripping and other hazards," mandates that "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." Both of these regulations are specific enough to support a claim under Labor Law § 241 (6) and are applicable to the facts of this case (*see Lopez v City of New York Transit Auth.*, 21 AD3d 259, 259 [2005]; *Farina v Plaza Constr. Co.*, 238 AD2d 158, 159 [1997]; *Colucci v Equit. Life Assur. Socy. of the United States*, 218 AD2d 513, 515 [1995]). Plaintiff testified that in order to get to his gang box, he had to side step over at least six inches of debris because "there was so much stuff on the floor." Plaintiff further testified that as "[he] was stepping over on an angle," his left knee twisted causing him to slip. Here, triable issues of fact exist as to whether plaintiff's twisting, slipping, loss of balance and subsequent injury proximately resulted from defendants' noncompliance with 12 NYCRR 23-1.7 (d) and (e) (2). This is sufficient to establish a prima facie case; plaintiff is not obligated to eliminate all other potential causes of his injury (*see Locilento v Coleman Catholic High School*, 134 AD2d 39, 41 [1987]). As a general proposition, plaintiff's failure to identify the object that caused his foot to slip cannot be equated with a failure to identify the cause of his fall (*cf. Giuffrida v Metro N. Commuter R. R. Co.*, 279 AD2d 403 [2001]).

Plaintiffs' Labor Law §200/Common -Law Negligence Claim

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work (*see Rizzuto v L. A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The statue applies to owners and contractors who exercise control or supervision over the

work being performed, or who have either created a dangerous condition or had actual or constructive notice of such condition (*see Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]).

Defendants seek dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims based on the grounds that they did not direct or control plaintiff's work or have notice of a hazardous condition. In support of its motion for summary judgment, MHI proffers plaintiff's deposition testimony. During his deposition, plaintiff testified that he did not deal with anyone from MHI prior to his accident. When asked if plaintiff reported to a supervisor at the work site, plaintiff testified that as foreman for his subcontractor employer, he was "the supervisor on the job." Plaintiff further testified that his duties consisted of "oversee[ing] [the] job" and "be[ing] the go-to-guy for the general contractors." In addition, plaintiff testified that his complaints about the pile-up of debris at the work site were only made to ABI's superintendent. Thus, MHI has established its prima facie entitlement to summary judgment by demonstrating that it did not exercise supervisory control over plaintiff's work, and that it neither created nor had actual or constructive knowledge of any hazardous condition (*see Dwoskin v Burger King Corp.*, 249 AD2d 358 [1998]; *Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]).

In opposition, plaintiffs and ABI's contention that MHI maintained an ongoing supervisory presence at the work site in that its project manager made weekly visits to the site to observe the ongoing progress and MHI also held weekly project meetings at the site, is insufficient to establish a triable issue as to MHI's negligence. To establish liability under common-law negligence and Labor Law § 200, the plaintiff must establish that the defendant had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Rizzuto*, 91 NY2d at 352; *Singleton v Citnalta Constr. Corp.*,

291 AD2d 393, 394 [2002]). Further, "[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004], *lv denied*, 4 NY3d 702 [2004]). Accordingly, there is no basis for imposing liability on MHI under Labor Law § 200 (1) and common-law negligence (*see Comes*, 82 NY2d at 877; *Ross*, 81 NY2d at 500; *Lombardi*, 80 NY2d at 295).

As to ABI, questions of fact exist as to the extent of ABI's duty to keep the work site clean and free of debris, whether or not that obligation was satisfied, and whether it had constructive notice of the allegedly defective condition (*see Butigian v Port Auth. of New York and New Jersey*, 266 AD2d 133 [1999]; *Lynx v Abax*, 268 AD2d 366 [2000]). During his deposition, plaintiff testified that prior to the date of his accident, "there was never a clear path" in the conference room, and he had complained about the debris to ABI's superintendent "[a] number of times." Plaintiff further testified that approximately ten minutes before the accident, he had asked ABI's superintendent to remove the debris from the conference room so that he could complete the last phase of his job.

In addition, Peter Austin, who signed the contract between MHI and ABI, as ABI's Vice President, testified that ABI subcontracted with plaintiff's employer, CWG, to perform electrical services at the work site, and also hired other subcontractors to provide, *inter alia*, the flooring, painting, HVAC, and marble work. Austin further testified that ABI's superintendent was at the work site on a daily basis and "ran the project as far as the day-to-day activity with the different trades, subcontractors, coordinating, making sure the job was maintained, and that people reached certain landmarks on the project." Austin also testified that since the renovation project was on MHI's executive floor, "it was a very sensitive area," because MHI "ran a lot of their corporate

meetings" on that floor. As such, Austin stated that ABI always had a full-time laborer at the work site "to make sure everything was fine," and "to clean and move stuff around so that [the] trades could work there." With respect to the contractual agreement between MHI and ABI, paragraph 3.3.1 establishes that ABI was responsible for supervising, directing, and coordinating all portions of the work to be performed under the contract. Paragraph 3.15.1 further provides that ABI was responsible for "keep[ing] the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the [c]ontract." In addition, under paragraphs 10.1 and 10.2, ABI was responsible for maintaining a safety program.

Under the circumstances, plaintiff's showing that ABI was responsible for project safety, debris removal, and work-area cleanups, and that he complained to ABI's superintendent about the pile of debris, presents issues of fact as to whether ABI had actual knowledge of the unsafe condition which precipitated plaintiff's injury and whether it had control over the safety aspects of the work site. Thus, triable issues of fact exist which preclude ABI from obtaining summary judgment on plaintiffs' common-law negligence and Labor Law § 200 claims (*see Maza v Univ. Ave. Dev.* Corp., 13 AD3d 65 [2004]; *Shaheen v Intl. Bus. Machs. Corp.*, 157 AD2d 429 [1990]).

Common Law and Contractual Indemnification

In the absence of evidence of any active negligence on MHI's part, MHI is only subject to the vicarious liability arising from Labor Law § 241 (6). Thus, MHI is entitled to conditional summary judgment against ABI for contractual and/or common law indemnification in the event that a judgment is entered awarding damages in favor of plaintiffs for any vicarious liability under Labor Law § 241 (6) (*see Aragon v 233 W. 21st* St., 201 AD2d 353 [1994]; *Abramo v Pepsi-Cola Buffalo*

Bottling Co., 224 AD2d 980 [1996]).

CONCLUSION

Both motions are granted to the extent that plaintiffs' Labor Law § 240 (1) claims are dismissed. In addition plaintiffs' Labor Law § 241 (6) claims are dismissed with the exception of those predicated upon alleged violations of Industrial Code § 23-1.7 (d) and (e)(2). The branch of MHI's motion by which it seeks a dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is granted. MHI is also granted conditional summary judgment on its claim against ABI for contractual and / or common-law indemnification. ABI's motion is denied to the extent that it seeks a dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims. A pretrial conference shall be conducted on April 30, 2007.

This constitutes the decision and order of the court.

DATED: MAR 07 2007

J.S.C.

HON. LELAND DeGRASSE