Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

MARIO MONTERROZA

- against -

STATE UNIVERSITY CONSTRUCTION FUND

Index Number 11415 2003

Motion Date January 17, 2007

Motion Cal. Number 41

STATE UNIVERSITY CONSTRUCTION FUND

- against -

OMNI CONTRACTING CO. INC.

The following papers numbered 1 to 27 read on this motion by defendant/third-party plaintiff State University Construction Fund (SUCF) pursuant to CPLR 3212 for summary judgment dismissing the complaint or in the alternative for summary judgment against the third-party defendant Omni Contracting Co., Inc. (OMNI) on the third-party claims for common law and contractual indemnification; on the cross motion by the third-party defendant OMNI pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability on the Labor Law § 240(1) claim.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-12
Answering Affidavits - Exhibits.....	13-22
Reply Affidavits.....	23-27

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is an action to recover for personal injuries allegedly sustained as a result of a work site accident. The accident occurred on April 22, 2002. The plaintiff was a employed by third-party defendant OMNI who had been hired to work on a project involving the expansion of the engineering building at the State University of New York at Stony Brook. The plaintiff alleges claims for violations of Labor Law §§ 200, 240(1) and 241(6), and common-law negligence.

The plaintiff testified at his examination before trial that on the date of the accident, he was leveling out garbage that was in a garbage container. The plaintiff stated that to accomplish this task, he climbed into the container, which was approximately seven feet tall, and walked on top of the garbage. Plaintiff alleges that as he was getting out of the container he slipped and fell to the ground which caused his injuries. The plaintiff claims that he fell because the container was wet.

The claim under Labor Law § 240(1) must be dismissed as the work involved did not involve elevation related risks for which special safety devices were required (see Bonse v Katrine Apt. Assoc., 28 AD3d 990 [2006]; Magnuson v Syosset Community Hosp., 283 AD2d 404 [2001]). Here, the plaintiff slipped from a ground-level garbage container to the floor below after leveling out debris. The Second Department has held that where a plaintiff falls from a ground-level dumpster to the floor below there is no violation of Labor Law § 240(1) (Georgopulos v Gertz Plaza, 13 AD3d 478 [2004]). Therefore, there was no violation of Labor Law § 240(1), and that cause of action must be dismissed.

The cause of action alleging a violation of Labor Law § 241(6) must also be dismissed. To prevail under Labor Law § 241(6) the plaintiff must prove that his injuries where proximately caused by a violation of an Industrial Code provision that sets forth specific requirements of conduct (see Rivera v Santos, 35 AD3d 700 [2006]; Jicheng Liu v Sanford Tower Condominium, 35 AD3d 378 [2006]; Portillo v Roby Anne Dev., LLC, 32 AD3d 421 [2006]). Here, in response to the defendant's prima facie demonstration of entitlement to judgment as a matter of law, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The ground-level dumpster did not constitute an elevated working surface as contemplated by 12 NYCRR 23-1.7 (see Porazzo v City of New York, __ AD3d __, 2007 NY Slip Op 03287 [2d Dept, April 17, 2007]; Roberts v Worth Const., 21 AD3d 1074 [2005]). Furthermore, any alleged violations of 12 NYCRR 23-1.8(c)(2) and (3) were not

the proximate cause of the accident (see Biafora v City of New York, 27 AD3d 506 [2006]; Cunningham v Alexander's King Plaza, LLC, 22 AD3d 703 [2005]). Those provisions concern the type of shoe and clothes that must be provided in order to keep the worker dry if it is raining out. The fact that there may have been a violation did not contribute to the plaintiff slipping from the dumpster, and thus, the claim must be dismissed.

Additionally, the common law negligence and Labor Law § 200 must be dismissed. The defendant SUCF neither directed nor controlled the work of the plaintiff and SUCF did not have notice of the specific hazardous condition (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006] Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact that would warrant denial of the motion.

As to the cross motion by the plaintiff, though it was untimely, as it was made more than 120 days after the filing of the note of issue, the Court will consider it as the motion of the defendant for summary judgment was made on nearly identical grounds (see Grand v Peteroy, __ AD3d __, 2007 NY Slip Op 03098 [2d Dept, April 10, 2007]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496 [2005]). Since the issues raised by the untimely cross motion, namely the plaintiff's Labor Law 240(1) cause of action, are already properly before this Court, this provides the requisite good cause to review the untimely cross motion (Grand v Peteroy, ___ AD3d ___, 2007 NY Slip Op 03098 [2d Dept, April 10, 2007]). However, as the Court is granting the defendant's summary judgment motion to dismiss the complaint, the plaintiff's cross motion for summary judgment must be denied.

Accordingly, the defendant/third-party defendant SUCF's motion is granted and the complaint is dismissed. The branch of SUCF's motion on the third-party complaint for common law and contractual indemnification is denied as academic. In light of the dismissal of the first party action, the third-party defendant's cross motion to dismiss the third-party complaint is granted on the ground that the third-party action is dismissed as academic. The cross motion by plaintiff for summary judgment is denied.

Dated: April 20, 2007

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J.S.C.